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In the

Supreme Court of the United States

October Term, 1956

No. 228

ELIZA JANE DOBY AND J. LILLIAN DOBY,
Petitioners,

v.

R. L. BROWN, JR., JOHN B. MORRIS, JR., J. HEATH MORROW, CHARLES W. PICKLER, H. WELLS ROGERS, TED FURR, TRUSTEES OF THE ALBEMARLE CITY ADMINISTRATIVE UNIT, AND CLAUD GRIGG, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE ALBEMARLE CITY ADMINISTRATIVE UNIT,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Specification of Errors 3

Constitutional Provisions and Statutes Involved 3

Statement of the Case 5

Federal Questions Raised Below in Trial Court and Before Circuit Court 7

Reasons for Allowance of the Writ 8

Conclusion 14

Appendix A:

Complaint of Plaintiffs Filed in District Court, Middle District of North Carolina, August 19, 1955 ..... App. 1

Amendment to Complaint of Plaintiffs, Filed in District Court, Middle District of North Carolina, Filed on or About September 20, 1955 ..... App. 10

Appendix B:

Findings of Fact and Conclusions of Law of District Court Entered November 4, 1955 ..... App. 13

Opinion of District Court Entered November 4, 1955 ..... App. 18

Appendix C:

Judgment of Circuit Court Entered April 9, 1956 ..... App. 22

Opinion of Circuit Court Entered April 9, 1956 ..... App. 23

Appendix D:

Chapter 1162, 1953 Session Laws, State of North Carolina: Act to Authorize the Issuance of School Building Bonds and Notes in Behalf of the Albemarle City Administrative Unit ..... App. 28

TABLE OF CITATIONS

Cases

Page

A. F. of L. v. Watson, 327 U. S. 582, 90 L. Ed. 873, 66 S. Ct. 761 ..... 11, 12, 13

Bell v. Hood, 66 S. Ct. 773, 327 U. S. 678, 90 L. Ed. 939 10

Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686 7

Burlington City Board of Education v. Allen, 243 N. C. 520, 91 S. E. (2d) 180 8

Crampton v. Zabriskie, 101 U. S. 601, 25 L. Ed. 1070 ..... 9, 12

Cuyahoga River Power Co. v. Akron, 240 U. S. 462, 36 S. Ct. 402, 60 L. Ed. 743 10

Davis v. Wakelee, 156 U. S. 680, 39 L. Ed. 578 11

Eliza Jane Doby and J. Lillian Doby v. R. L. Brown, Jr., et als, Trustees, ... F. (2d) 12

Doud v. Hodge, ... U. S. ....., 100 L. Ed. (Adv. p. 398), 76 S. Ct. 491 13

Fidelity & Deposit Co. v. Tafoga, 270 U. S. 426, 46 S. Ct. 331, 70 L. Ed. 664 10

Gully v. First National Bank in Meridan, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70 12

Hettenbaugh v. Airline Pilots Assoc., 189 F. (2d) 319 12

Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510 ..... 11, 12, 13

Kansas City v. Railroad, 101 F. Supp. 1 ..... 10, 12

Mosher v. City of Phoenix, 287 U. S. 29, 53 S. Ct. 67, 77 L. Ed. 148 ..... 10, 13

Power & Light Co. v. City of Portland, 181 F. 632 ..... 6, 11, 13

Page

Shipman v. Dupree, 88 F. Supp, 482, 339 U. S. 321, 70 S. Ct. 640 ..... 12, 13

Swafford v. Templeton, 185 U. S. 487, 22 S. Ct. 783, 46 L. Ed. 1005 12

The Fair v. Kohler Die & Specialty Co., 228 U. S. 22, 33 S. Ct. 410, 57 L. Ed. 716 10

Wiley v. Sinkley, 179 U. S. 58, 21 S. Ct. 17, 45 L. Ed. 84 12

Constitutional Provisions

Constitution of North Carolina, Art. IX, Sec. 2 4

Constitution of United States, Am. 14 3

State Statutes

General Statutes of North Carolina, Sec. 115-2 4

1953 Session Laws of North Carolina, Chap. 1102 ..... 4 and App. D

Federal Statutes

Title 28 U. S. C. A., Sec. 1254(1) 2

Title 28 U. S. C. A., Sec. 2201, et seq 3

Title 28 U. S. C. A., Sec. 2283 ..... 2, 8

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

YOUR PETITIONERS, ELIZA JANE DOBY AND J. LILLIAN DOBY, respectfully pray that a Writ of Certiorari be issued out of and under the Seal of this Court to review the decision of the United States Court of Appeals for the Fourth Circuit rendered on April 9, 1956, which decision affirmed

a judgment of the United States District Court for the Middle District of North Carolina dismissing the Petitioners' Complaint for lack of Federal jurisdiction.

OPINIONS BELOW

The District Court for the Middle District of North Carolina entered its Findings of Fact and Conclusions of Law on November 4, 1955. (Appendix B, Page 13).

On the same day, November 4, 1955, the District Court entered its Opinion. (Appendix B, Page 18).

Neither the Findings of Fact and Conclusions of Law nor the Opinion of the District Court is reported in the official reporter system.

The Opinion of the Circuit Court of Appeals for the Fourth Circuit approving the District Court on the question of lack of Federal jurisdiction is reported in .... F. (2d) ..... (Appendix C, Page 23).

JURISDICTION

Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by 28 U.S.C.A. Sec. 1254(1).

The judgment of the Court of Appeals was entered on April 9, 1956 and appears at Page 22, Appendix C.

QUESTIONS PRESENTED

The questions presented for review are as follows:

1. Whether the Federal District Court has jurisdiction to hear and determine the cause of the plaintiffs.

2. Whether this action is one for permanent injunction to stay proceedings in a State Court prohibited by Sec. 2283, Title 28, U.S.C.A.

3. Whether the plaintiffs have stated a claim arising under the Constitution, laws or treaties of the United States.

4. Whether the plaintiffs have stated a claim of deprivation under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States.

SPECIFICATION OF ERRORS

The Court of Appeals erred as follows:

1. In affirming the District Court in the Conclusion that the Court does not have jurisdiction of the parties or of the subject matter.

2. In holding that this is an action for permanent injunction to stay proceedings in a State Court prohibited by 28 U.S.C.A. 2283.

3. In holding that the plaintiffs have not stated a claim arising under the Constitution, laws or treaties of the United States.

4. In holding that the plaintiffs have not stated a claim of deprivation under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Federal Declaratory Judgment Act, 28 U.S.C.A. 2201, *et seq.*

3. Constitution of State of North Carolina, Article IX, Sec. 2: "General Assembly shall provide for schools; separation of the races—The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate schools; but there shall be no discrimination in favor of, or to the prejudice of, either race."

4. General Statutes of North Carolina, Sec. 115-2: "Separation of races—The children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of or to the prejudice of either race. All white children shall by taught in the public schools provided for the white race, and all colored children shall be taught in the public schools provided for the colored race; but no child with negro blood, or what is generally known as Croatan Indian blood, in his veins, shall attend a school for the white race, and no such child shall be considered a white child. The descendants of the Croatan Indians, now living in Richmond, Robeson, and Sampson counties, shall have separate schools for their children."

5. Chapter 1162, 1953 Session Laws of State of North Carolina, authorizing the issuance of school building bonds and notes in behalf of the Albemarle City Administrative Unit, adopted by the Legislature of the State of North Carolina April 29, 1953. (Because of length of provisions of this enactment, text appears in Appendix D).

STATEMENT OF THE CASE

On April 29, 1953, the General Assembly of North Carolina authorized the Albemarle City Administrative Unit, a public school district or unit embracing the City of Albemarle, North Carolina, to have and to call a special bond election for the purpose of issuing bonds in the sum of $1,250,000.00, to be used in purchasing sites and erecting and equipping school buildings within the limits of the Albemarle City Administrative Unit. The bonds were to be issued in the name of Stanly County but were to be paid from taxes levied on taxpayers in said Administrative Unit.

At the time of the adoption of the Act authorizing the special bond election, the Constitution of the State of North Carolina and the General Statutes enacted pursuant thereto provided for separate public schools for members of the white race and members of the colored race.

On April 20, 1954, acting under the authority of said Act of the General Assembly of North Carolina, the Board of Commissioners of Stanly County called and ordered a special election to be held on June 8, 1954, on the question of the issuance of said bonds in the sum of $1,250,000.00. Pursuant to the call and order for said bond election, the majority of the voters who voted in said election approved the issuance of said bonds.

On November 20, 1954, the Trustees of the Albemarle City Administrative Unit, the defendants in this cause, instituted administrative proceedings against the plaintiffs herein for the purpose of taking by condemnation proceedings approximately 27 acres of valuable land belonging to the plaintiffs and situate within the limits of the City of Albemarle.

Thereafter, on or about August 19, 1955, and while the above mentioned administrative proceedings were still pend-

ing and before any judicial action had been taken by the Trustees and before any hearing had been held in said administrative proceedings to determine the amount of compensation which the plaintiffs, as owners of the land being condemned, should receive, the plaintiffs instituted this action in the District Court of the United States for the Middle District of North Carolina seeking a declaratory judgment to declare the use of monies derived from the sale of bonds pursuant to the Act of the Legislature of the State of North Carolina invalid for the purpose of paying the condemnation price of the land in question. The plaintiffs contend that the action of the defendants in their capacity as members of the Albemarle City Administrative Unit is illegal, unlawful and unconstitutional in that the plaintiffs are being deprived of their property without due process of law for that the defendants have no valid power to condemn the lands of the plaintiffs.

It is pointed out that the plaintiffs do not, in this case, attack the mechanics or procedure employed by the defendants but contend that the authority under which the defendants purport to act is unconstitutional and as such deprive the plaintiffs of their property without due process of law guaranteed to them by the Fourteenth Amendment of the Federal Constitution. (*Power & Light Co.* v. *City of Portland*, 181 F. 632. (Appeal dismissed, 31 S. Ct. 220, 218 U.S. 686, 54 L. Ed. 1209)).

The defendants were duly served with Summons and Complaint and in due time answered the Complaint of the plaintiffs and as their *Fifth Defense* raised the question of jurisdiction of the Federal Court.

After the hearing of this case before Honorable Judge Hayes, the Court issued its judgment and opinion on or

about November 4, 1955, in which the Court concluded that it had no jurisdiction of the cause. From this judgment and opinion the plaintiffs in apt time appealed to the Circuit Court for the Fourth Circuit.

This cause was argued in the Circuit Court on March 22, 1956 and judgment of the Circuit Court was rendered April 9, 1956, affirming the District Court.

FEDERAL QUESTIONS RAISED BELOW IN TRIAL COURT AND BEFORE CIRCUIT COURT

In the District Court and the Circuit Court, the plaintiffs sought to invoke the jurisdiction of the Court upon the grounds that the amount in controversy exceeded $3000.00 (the value of the land sought to be condemned being many times in excess of the minimum requirement) and that a real and substantial controversy existed between the parties (not the amount of compensation for the land involved but the authority of the Trustees-defendants to condemn).

The plaintiffs further contended that the 1953 Act of the General Assembly of North Carolina (Appendix D, Page 28) was rendered unconstitutional and repugnant to the Constitution and laws of the United States as evidenced by this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, for the reason that the 1953 Enabling Act together with the provision of the North Carolina Constitution requiring separation of races in public schools (Page 4) which as a legal matter became part and parcel of the enabling Act would permit only the purchasing of sites and the erection of schools for the use of the separate races and that separation of races solely on the basis of color was no longer allowed.

The plaintiffs contended that without a valid authoriza-

tion, the taking of the plaintiffs' land would constitute a deprivation of their property without due process of law guaranteed to them by the United States Constitution.

ARGUMENT OF REASONS FOR ALLOWANCE OF THE WRIT

1. Even though we are not here confronted with conflicting decisions of various Circuit Courts on the same matter, it is respectfully submitted that this Court should entertain this Writ as being based on special and important reasons. We feel that the Circuit Court has decided an important question of Federal law in a way to conflict with applicable decisions of this Court in such a way as to call for an exercise of this Court's power of supervision.

It is respectfully submitted that the decision in the *Brown* v. *Board of Education* case raised many questions of vital importance that should be entertained and decided by the Federal Courts and that the controversy presented in this case is one of such problems. Because of this importance, the Writ should be allowed.

2. The ruling of the trial court that this is an action for permanent injunction to stay proceedings in a State Court and is prohibited by 28 U.S.C.A. 2283, is erroneous.

Title 28 U.S.C.A. 2283 provides that an injunction restraining proceedings in a State Court shall not be granted except as authorized by an Act of Congress or where necessary in aid of the Court's jurisdiction.

In the first place, at the time of the institution of this action and at the time of the hearing before Judge Hayes, no State Court proceeding had been instituted, only an administrative proceeding. *Burlington City Board of Educa-*

tion v. *Allen*, 243 N.C. 520, 91 S.E. (2d) 180, wherein the North Carolina Supreme Court in passing upon the nature of the proceedings instituted by the plaintiff Board of Education for condemnation stated:

> "The petitioner (Board of Education) is an administrative agency of the government. In selecting a site for a new building . . ., it acts in its administrative capacity . . . consequently, it is not required that the proceeding be instituted by the issuance of a summons as in case of special proceedings or civil actions . . . The right of appeal is granted by the statute. . . ., and it is by the appeal and docketing of the record in the Superior Court that the proceeding becomes judicial in nature."

This Court has not denied to litigants the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which taxpayers may otherwise be compelled to pay. *Crampton* v. *Zabriskie*, 101 U.S. 601, 25 L. Ed. 1070.

3. The ruling of the trial court that it did not have jurisdiction of the parties to the action is erroneous.

The defendants were personally served with process, filed answer and participated in all of the proceedings held in connection with this matter.

4. The rulings of the trial court that the plaintiffs have not stated a claim arising under the Constitution, laws or treaties of the United States and have not stated a claim of deprivation under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States

(Page 3 and Appendix B, Page 17) are rulings which the Court could not make except upon the taking of jurisdiction and the deciding of the case on its merits. It is well settled that failure to state a cause of action calls for a judgment on the merits and not a dismissal for want of jurisdiction. To sustain such a ruling, the Court must first take jurisdiction. *Bell* v. *Hood*, 66 S. Ct. 773, 327 U. S. 678, 90 L. Ed. 939; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 33 S. Ct. 410, 57 L. Ed. 716; *Kansas City* v. *R.R.*, 101 F. Supp. 1; *Mosher* v. *City of Phoenix*, 287 U.S. 29, 53 S. Ct. 67, 77 L. Ed. 148.

In the *Mosher* v. *City of Phoenix* case, the owner of realty sought to restrain the City for appropriating part of his property for street widening purposes, alleging that such action was an attempt to take and appropriate property in violation of due process of law and that the proceedings for condemnation and taking were void under the law of Arizona. The case was dismissed by the Federal Court as not presenting a real and substantial Federal question. The United States Supreme Court reversed this holding and Justice Hughes pointed out that there was no diversity of citizenship and jurisdiction would depend upon the presentation by the Complaint of a substantial Federal question and that the allegation that the City was acting under color of State authority and by so doing was violating a private right secured by the Federal Constitution constituted such substantial Federal question and that it was error for the District Court to refuse jurisdiction. "Whether the plaintiff has any rights can be decided only by taking jurisdiction of the case." 53 S. Ct. 67, 68.

To the same effect are *Cuyahoga River Power Co.* v. *Akron*, 240 U.S. 462, 36 S. Ct. 402, 60 L. Ed. 743; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U.S. 426, 46 S. Ct. 331, 70

L. Ed. 664; *A.F. of L.* v. *Watson*, 327 U.S. 582, 90 L. Ed. 873, 66 S. Ct. 761.

5. The trial court and the Circuit Court erred in ruling that the Federal Court does not have jurisdiction of the subject matter.

There is no question but that an actual controversy exists in the case at bar between the plaintiffs and the defendants. The defendants, in their capacity as members of the Administrative Unit, are endeavoring to condemn lands owned by the plaintiffs under authority which the plaintiffs contend is unconstitutional. The authority of the defendants to take the lands of the plaintiffs under condemnation having been questioned, there can be no conclusion except that an actual and bona fide controversy exists. It is no defense on the question of jurisdiction for the defendants to say that the plaintiffs should be satisfied with whatever monetary award is given them. If the defendants are acting under invalid powers, the attempt to deprive the plaintiffs of their land constitutes a violation of due process of law and the Court has the power and the duty to inquire into the power under which the defendants purport to proceed. *Power & Light Co.* v. *City of Portland*, 181 F. 632 (Appeal dismissed, 31 S. Ct. 220, 218 U.S. 686, 54 L. Ed. 1209); *Home Telephone & Telegraph Co.* v. *City of Los Angeles*, 227 U.S. 278, 33 S. Ct. 312, 57 L. Ed. 510; *Davis* v. *Wakelee*, 156 U.S. 680, 39 L. Ed. 578.

The Complaint in this cause alleges that by attempting to take the lands of the plaintiffs under color of authority which the plaintiffs allege to be unconstitutional, the defendants are denying to the plaintiffs the equal protection of law as guaranteed them by the Fourteenth Amendment to the Constitution of the United States and that the plaintiffs

will thereby suffer irreparable damage. There are ample allegations in the Complaint of violations by the defendants of the rights and privileges guaranteed by the Federal Constitution to the plaintiffs. It is further apparent from the Complaint that the rights of the plaintiffs will be supported if the Constitution and the laws of the United States are given one construction or effect and will be defeated if they are given another construction. *Gully* v. *First Natl. Bank in Meridan*, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70; *Hettenbaugh* v. *Airline Pilots Assoc.*, 189 F. (2d) 319.

The existence or non existence of a Federal Question is to be determined from the plaintiffs' pleading, unaided by any defenses anticipated or interposed. *Kansas City* v. *R.R.*, 101 F. Supp. 1; *Shipman* v. *Dupree*, 88 F. Supp. 482 (Vacated on Other Grounds, 70 S. Ct. 640); *A.F. of L.* v. *Watson*, 327 U.S. 582, 90 L. Ed. 873, 66 S. Ct. 761.

This Court has ruled that the prohibitions and guarantees of the Fourteenth Amendment control, not only the states, but also every person who is the repository of state power. *Home Telephone Co.* v. *City of Los Angeles*, 227 U.S. 278, 33 S. Ct. 312, 57 L. Ed. 510; *Crampton* v. *Zabriskie*, 101 U.S. 601, 25 L. Ed. 1070.

Cases have been held adequate to state a cause of action where the allegations to show that the matter in controversy arose under the Constitution and laws of the United States are far less specific than those in the case at bar. *Wiley* v. *Sinkley*, 179 U.S. 58, 21 S. Ct. 17, 45 L. Ed. 84; *Swafford* v. *Templeton*, 185 U.S. 487, 22 S. Ct. 783, 46 L. Ed. 1005.

Judge Parker in the Opinion of the Circuit Court in this case (Appendix C, Page 24) has stated:

> "They (the plaintiffs) argue that condemnation of their land may not be had because the statute authoriz-

> ing the bond issue must be construed as authorizing the proceeds to be used only for the purposes of segregated schools, which may not be lawfully conducted since the segregation decision. It is perfectly clear, however, that the question thus presented is not one arising under the Constitution or laws of the United States but involves merely the interpretation and application of the state statute."

Judge Parker then concludes (Appendix C, Page 26):

> "Even if a federal question should be held to be involved in the case, it would arise only in connection with the interpretation of state statutes which could be readily passed upon by the courts of the state in the pending condemnation proceedings, and the District Judge was correct in thinking that the federal court ought not assume jurisdiction to interpret and pass upon the state statutes in advance of their construction by the state courts."

It is again respectfully pointed out to this Court that a decision that this case involves interpretation of state statutes which could be readily passed upon by the courts of the state is a decision that only properly be reached by taking jurisdiction of the subject matter. *Mosher* v. *City of Phoenix*, 287 U.S. 29, 53 S. Ct. 67, 77 L. Ed. 148; *Power & Light Co.* v. *City of Portland*, 181 F. 632 (Appeal Dismissed, 31 S. Ct. 220, 218 U.S. 686, 54 L. Ed. 1209); *Home Telephone Co.* v. *City of Los Angeles*, 227 U.S. 278, 33 S. Ct. 312, 57 L. Ed. 510. See also *A.F. of L.* v. *Watson*, 327 U.S. 582, 90 L. Ed. 873, 66 S. Ct. 761; *Shipman* v. *Dupree*, 339 U.S. 321, 70 S. Ct. 640.

In the recent case of *Doud* v. *Hodge*, ... U.S. ....., 100 L. Ed. (Adv. p. 398), 76 S. Ct. 491, this Court specifically stated:

"This Court has never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution simply because the state courts had not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute."

"We hold that the District Court has jurisdiction of this cause. It was error to dismiss the complaint for lack of jurisdiction. The judgment of the District Court is vacated and the case is remanded to it."

CONCLUSION

WHEREFORE, for the reasons hereinabove stated, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, SALISBURY DIVISION

Civil No. 337

ELIZA JANE DOBY and J. LILLIAN DOBY,
Plaintiffs

v.

R. L. BROWN, JR., JOHN B. MORRIS, JR., J. HEATH MORROW, CHARLES W. PICKLER, H. WELLS ROGERS, TED FURR, Trustees of the Albemarle City Administrative Unit, and CLAUD GRIGG, Superintendent of Public Instruction of the Albemarle City Administrative Unit,
Defendants

Complaint

NOW COMES THE PLAINTIFFS, and as their cause of action against the defendants, allege:

1. That the plaintiffs are residents and citizens of Davidson County, State of North Carolina.

2. That the plaintiffs are owners of real estate situate in Stanly County, North Carolina, and are taxpayers of said County.

3. That the said real estate owned by the plaintiffs lies partly within the boundaries of the Albemarle City School Administrative Unit.

4. That the defendants, R. L. Brown, Jr., John B. Morris, Jr., J. Heath Morrow, Charles W. Pickler, H. Wells Rogers, and Ted Furr are now, and were at the times hereinafter alleged, the duly elected, qualified and acting Trustees of the Albemarle City Administrative Unit, a Public School Administrative Unit in Stanly County, North Carolina, with the exception of Ted Furr who has recently become a member of said Board.

5. That the defendant, Claud Grigg, is now and was at the times hereinafter alleged, the duly elected, qualified and acting Superintendent of Public Instruction of the Albemarle City Administrative Unit, Albemarle, Stanly County, North Carolina.

6. That the amount in controversy in this cause exceeds $3,000.00, exclusive of interest and court costs.

7. That this action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, and is brought to obtain a declaration of legal relations, the rights, and the status between the plaintiffs and their property, and the defendants, and to enjoin and restrain the threatened deprivation, under color of the Constitution of the State of North Carolina and certain statutes enacted pursuant thereto, of certain property rights, privileges and immunities secured to the plaintiffs.

8. That the 1953 Session of the General Assembly of North Carolina enacted Chapter 1162 of the 1953 Session Laws, ratified on April 29, 1953, entitled "An Act to Authorize the Issuance of School Building Bonds and Notes in Behalf of the Albemarle City Administrative Unit as a Special Bond Tax Unit and the Levy of Taxes within such

Unit for the Payment of the Principal and Interest of such Bonds and Notes."

9. That said Act authorized the Board of County Commissioners of Stanly County, North Carolina, to order a special election to be held in the Albemarle City Administrative Unit, which is a school district in Stanly County, State of North Carolina, embracing all the territory within the city limits of the Town of Albemarle and additional territory outside of said city limits, as the plaintiffs are advised, informed and believe; that pursuant to said Act, said special election was ordered to be held by the Board of County Commissioners of Stanly County, North Carolina, and was held on the 8th day of June, 1954, for the purpose of voting on the question of the issuance of bonds of Stanly County in the sum of $1,250,000.00 to be used "for the purpose of acquiring, erecting, enlarging, altering, and equipping school buildings, including gymnasiums, shops, agricultural buildings, school cafeterias, and other necessary buildings, and purchasing sites in such district or unit, or for any one or more of said purposes," and also for the purpose of authorizing the levy of a sufficient tax for the payment and retirement of said bonds.

10. That the notice of said special election, as ordered by the Board of County Commissioners of Stanly County, was given on April 20, 1954, and in said special election a majority of the qualified votes in said Administrative Unit voted in favor of the issuance of said bonds and in favor of the levy of a sufficient tax for the payment and retirement of said bonds, pursuant to the provisions of said Chapter 1162 of the Session Laws of 1953, as the plaintiffs are advised, informed and believe.

11. That shortly after said special bond election on June 8, 1954, the Board of County Commissioners of Stanly County adopted a resolution authorizing the issuance of said bonds in the sum of $1,250,000.00, to be issued in the name of Stanly County, but to be paid exclusively out of the taxes to be levied in the territory of the Albemarle City Administrative Unit, as the plaintiffs are informed, advised and believe.

12. That at the time of the enactment and ratification of Chapter 1162 of the Session Laws of 1953 by the General Assembly of North Carolina, and at the time of the calling of said special election by the Board of County Commissioners of Stanly County, North Carolina, the Constitution of the State of North Carolina contained a provision in Article IX, Section 2, that "the children of the white race and the children of the colored race shall be taught in separate public schools."

13. That at the time of the enactment and ratification of Chapter 1162 of the Session Laws of 1953 by the General Assembly of North Carolina, and at the time of the calling of said special election by the Board of County Commissioners of Stanly County, North Carolina, there was a statutory provision, as contained in the General Statutes of North Carolina, Chapter 115, Section 2, that "The children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of or to the prejudice of either race. All white children shall be taught in the public schools provided for the white race, and all colored children shall be taught in the public schools provided for the colored race."

14. That the plaintiffs respectfully represent and allege,

upon information and belief, that in view of the existing Constitution of the State of North Carolina and the laws enacted and made in pursuance thereto, at the time of the enactment and ratification of said Chapter 1162 of the 1953 Session Laws by the General Assembly of North Carolina, and at the time of the calling of said special election by the Board of County Commissioners of Stanly County, North Carolina, the aforesaid constitutional provision, as contained in the Constitution of North Carolina, and the aforesaid statutory provision as contained in the Statutes of North Carolina, as well as many judicial decisions of the highest court of the State of North Carolina, were in full force and effect and were as much a part of the Constitution and laws of the State of North Carolina as any of the other constitutional and statutory provisions embodied in the Constitution and laws of the State of North Carolina.

15. That said constitutional and statutory provisions, as contained in the Constitution and Statutes of North Carolina, as well as any judicial decisions of the highest court of the State of North Carolina, entered into and became a part of Chapter 1162 of the Session Laws of 1953 and the act of the Board of County Commissioners of Stanly County in calling said special bond election; and consequently entered into and became a part of the bonds issued pursuant to said special bond election and to any and all money derived from the sale of any of said bonds.

16. That since the decision of the Supreme Court of the United States in the "Segregation Cases" on May 17, 1954, and implemented by the decision of the United States Supreme Court in said cases on May 31, 1955, the plaintiffs say, on information and belief, that the expenditure of any

money derived from the sale of said bonds and the acquisition of a school site on which to build a high school solely and exclusively for children of the white race will be and constitute an illegal and prohibited use of said money; and likewise the plaintiffs say, upon information and belief, that the sale of any of the bonds authorized by the election on June 8, 1954, or the expenditure of any money that may be derived from the sale of said bonds for the building, repairing, expanding, or equipping of school buildings within the limits of the Albemarle City Administrative Unit, for the separate and exclusive use and benefit of either the children of the white race or the children of the colored race, for the operation of such a school on a segregated basis, will be illegal, invalid and unconstitutional.

17. That the defendants are undertaking by condemnation proceeding to take from the plaintiffs approximately 27 acres of valuable land, within the limits of the City of Albemarle, and within the limits of the Albemarle City Administrative Unit, for the avowed purpose of erecting upon said land a high school plant for the separate and exclusive use of the white pupils of said Alministrative Unit, and that said defendants are now erecting a high school building in the Kingville section of the City of Albemarle for the separate and exclusive use of the colored children of the Albemarle City Administrative Unit, and other colored children in other sections of Stanly County, and the defendants are paying for the erection of said high school building from funds derived from the aforesaid bond issue, as the plaintiffs are advised, informed and believe.

18. That the land which the defendants are attempting to take from the plaintiffs is well adapted for development as an exclusive and high class residential section, which is

the purpose to which the plaintiffs had determined to devote said land before the defendants began their efforts to take said land from the plaintiffs.

19. That the tract of land which the defendants are attempting to take from the plaintiffs, including the residence and timber thereon and the damage that will be done to the remaining land in the development by cutting off the frontage therefrom, has a reasonable market value of more than $120,000.00, but the defendants have offered the plaintiffs the sum of only $1,000.00 an acre for said land.

20. That if the defendants are allowed to take said land from the plaintiffs, it is their purpose to pay the value at which said land will be appraised in said condemnation proceeding from money derived from the sale of the bonds hereinabove mentioned, as the plaintiffs are advised, informed and believe, and which will be and constitute an illegal and unconstitutional use of said money, for the reasons hereinabove set forth.

21. That in said condemnation proceeding now pending before the Clerk of the Superior Court of Stanly County, the said Clerk may appoint appraisers to appraise the value of the land which the defendants are attempting to take from the plaintiffs; and upon said appraisal, the defendants may pay into the office of the Clerk of the Superior Court of Stanly County an amount of money equal to the appraised value of said land, and thereupon the title of the said 27 acres of land will immediately pass to the defendants, under the provisions of Section 115-85 of the General Statutes of North Carolina; that while there is a provision in said Statute for an appeal to the Superior Court in term time, where the plaintiffs may have the question of the value of

said land determined by a jury, there is no provision allowing an appeal upon any other question, and therefore the plaintiffs are precluded by the laws of the State of North Carolina from raising in said condemnation proceeding any of the questions concerning the validity of said bonds, the expenditure of any money derived from the sale thereof, the payment of the appraised value of the plaintiffs' land from funds derived from the sale of said bonds, or the erection of a high school plant for the separate and exclusive use of children of the white race on the site which the defendants are undertaking to condemn and take from the plaintiffs, or any other question upon which the plaintiffs are seeking a determination herein.

22. That in the aforesaid condemnation proceeding the plaintiffs are being denied the equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

23. That Chapter 1162 of the Session Laws of 1953 of the General Assembly of North Carolina provides that the proceeds arising from said bonds "shall be paid out only upon order of the Board of Trustees of the Albemarle City Administrative Unit," and they are named as defendants herein.

24. That unless the defendants are restrained and enjoined from taking the property of the plaintiffs to be used for an illegal and unconstitutional purpose and to be paid for with money arising from said bond issue, which was voted to buy sites for and to build segregated schools, when at the present time the defendants can not, under the Constitution of the United States, buy sites for and build segregated schools, the plaintiffs will suffer irreparable damage;

and therefore the plaintiffs say that they are entitled to an order of this court restraining and enjoining the defendants from using any of said bond money to pay for the site on the land of the plaintiffs, which the defendants are seeking to condemn, or to pay for the erection of a high school building thereon for the separate and exclusive use of white children.

WHEREFORE, the plaintiffs pray the Court:

A. To declare the rights, legal relations and status as between the plaintiffs and the defendants, and as to the property and property rights of the plaintiffs, in accordance with the allegations herein.

B. That the defendants be restrained and enjoined from proceeding with the condemnation case by which they are seeking to take the land of the plaintiffs; that they be restrained and enjoined from using any of the money derived from the sale of the bonds hereinabove referred to in paying the condemnation price of said land to the plaintiffs; and that they be restrained and enjoined from spending any of said bond money to build and erect a high school plant for the separate and exclusive use of the white children of the Albemarle City Administrative Unit on the land of the plaintiffs.

C. That a preliminary injunction upon due notice be issued and that this Complaint be used and considered as Motion and Affidavit therefor, restraining and enjoining the defendants, their agents, servants, employees and all persons in active concert or participation with them, from proceeding with the condemnation case by which they are seeking to take the land of the plaintiffs; that they be restrained and enjoined from using any of the money derived

from the sale of the bonds hereinabove referred to in paying the condemnation price of said land to the plaintiffs; and that they be restrained and enjoined from spending any of said bond money to build and erect a high school plant for the separate and exclusive use of the white children of the Albemarle City Administrative Unit on the land of the plaintiffs.

SEDBERRY, CLAYTON & SANDERS
By (s) J. C. SEDBERRY
(s) O. W. CLAYTON
(s) ROBERT G. SANDERS
Attorneys for Plaintiffs

(Duly verified)

Amendment to Complaint

NOW COME the plaintiffs herein, after leave of Court first had and received in open Court, and pursuant to the Federal Rules of Civil Procedure, and amend their Complaint in this cause by adding the following allegations and withdrawing the prayer contained in the Complaint and by substituting the prayer for relief as herein contained:

25. That the expenditure of any money derived from the sale of said bonds for the purchasing of school sites, and particularly the condemnation of the plaintiffs' land, and the building, repairing, expanding, or equipping of school buildings within the limits of the Albemarle City Administrative Unit, and particularly on the lands of the plaintiffs, for the attendance of both white and colored students on an integrated basis, constitutes an unlawful, invalid and illegal use of said money, and that such use of said money is violative

of the purpose for which the moneys were authorized to be used under the Constitution of the State of North Carolina and of the statutes enacted pursuant thereto at the time of the enactment and ratification of Chapter 1162 of the 1953 Session Laws by the General Assembly of the State of North Carolina, and at the time of the call for the special election pursuant to said Chapter 1162.

WHEREFORE, the plaintiffs pray the Court:

A. For a declaratory judgment to declare the rights, legal relations and status as between the plaintiffs and the defendants, and as to the property and property rights of the plaintiffs, in accordance with the allegations herein.

B. To adjudge that the use of the moneys derived from the sale of bonds pursuant to Chapter 1162 of the 1953 Session Laws of the General Assembly of the State of North Carolina for the purpose of paying the condemnation price of the lands of the plaintiffs for the erection, construction, maintenance and equipping of a school building thereon is illegal, unlawful, unconstitutional and invalid.

C. That the defendants be restrained and enjoined from proceeding with the condemnation case by which they are seeking to take the land of the plaintiffs; that they be restrained and enjoined from using any of the money derived from the sale of the bonds hereinabove referred to in paying the condemnation price of said land to the plaintiffs; and that they be restrained and enjoined from spending any of said bond money to build and erect a school plant for the separate and exclusive use of the white children of the Albemarle City Administrative Unit on the land of the plaintiffs; and that they be restrained and enjoined from spending any of said bond money to build and erect a school

plant for the use and attendance of white and colored students on an integrated basis on the land of the plaintiffs.

D. That a preliminary injunction upon due notice be issued and that this Complaint be used and considered as Motion and Affidavit therefor, restraining and enjoining the defendants, their agents, servants, employees and all persons in active concert or participation with them, from proceeding with the condemnation case by which they are seeking to take the land of the plaintiffs; that they be restrained and enjoined from using any of the money derived from the sale of the bonds hereinabove referred to in paying the condemnation price of said land to the plaintiffs; and that they be restrained and enjoined from spending any of said bond money to build and erect a school plant for the separate and exclusive use of the white children of the Albemarle City Administrative Unit on the land of the plaintiffs; and that they be restrained and enjoined from spending any of said money to build and erect a school plant for the use and attendance of white and colored students on an integrated basis on the land of the plaintiffs.

SEDBERRY, CLAYTON & SANDERS
By (s) J. C. SEDBERRY
(s) O. W. CLAYTON
(s) ROBERT G. SANDERS
Attorneys for Plaintiffs

(Duly verified)

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, SALISBURY DIVISION

Civil No. 337

ELIZA JANE DOBY and J. LILLIAN DOBY,
Plaintiffs

v.

R. L. BROWN, JR., JOHN B. MORRIS, JR., J. HEATH MORROW, CHARLES W. PICKLER, H. WELLS ROGERS, TED FURR, Trustees of the Albemarle City Administrative Unit, and CLAUD GRIGG, Superintendent of Public Instruction of the Albemarle City Administrative Unit,
Defendants

Findings of Fact and Conclusions of Law

This is an action commenced by Eliza Jane Doby and J. Lillian Doby against the Trustees of the Albemarle City Administrative Unit, a public school administrative unit in Stanly County, North Carolina.

The action involves certain lands owned by the plaintiffs, which the defendants are seeking to condemn for school purposes in an action pending in the Superior Court of Stanly County, North Carolina, and the use of the proceeds from bonds approved by the voters of the Albemarle City Administrative Unit in an election called on April 20, 1954, and held June 8, 1954, to pay for the condemnation price of said lands.

On November 20, 1954, the Trustees of the Albemarle City Administrative Unit instituted an action in the Superior Court of Stanly County, North Carolina, against

Eliza Jane Doby and J. Lillian Doby, the plaintiffs in this cause, to condemn 26.972 acres of their said land as a site for school purposes under Section 115-85, General Statutes of North Carolina, and other laws of said State applicable thereto.

The plaintiffs instituted this action on August 19, 1955, and seek to enjoin the defendants in this cause, as Trustees of the Albemarle City Administrative Unit, for proceeding further with the action to condemn their said lands pending in the Superior Court of Stanly County, North Carolina, and to enjoin them from using moneys derived from said bond election to erect a school plant on the lands sought to be condemned.

The bond election was called and held pursuant to and for the purposes designated in Chapter 1162 of the 1953 Session Laws of North Carolina, ratified on April 29, 1953.

The plaintiffs allege in their complaint that at the time of the enactment and ratification of Chapter 1162 of the Session Laws of 1953 by the General Assembly of North Carolina, and at the time the special election was called pursuant thereto, that the Constitution, statutes, and judicial decisions of the State of North Carolina provided that "the children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of, or to the prejudice of, either race"; that these constitutional provisions, statutes, and judicial decisions became a part of and entered into Chapter 1162 of said Session Laws, and the act of the Board of County Commissioners of Stanly County, North Carolina, in calling said election thereby became a part of the bonds and the proceeds of all moneys derived from the sale thereof.

The plaintiffs further allege in their complaint that the

defendants seek to condemn said lands as a site on which to build a high school solely and exclusively for children of the white race, and to pay for said lands with moneys derived from the sale of said bonds.

The plaintiffs further allege that the expenditure of any bond moneys for the separate and exclusive use and benefit of either the children of the white race or the children of the colored race will be illegal, invalid, and unconstitutional, since the decision of the United States Supreme Court in the Segregation Cases rendered on May 17, 1954. They also allege that any expenditure of bond moneys as a condemnation price for their lands for a school site on which to erect a school for white and colored students on an integrated basis would be in violation of the purpose for which said moneys were authorized to be used under the Constitution and statutes of North Carolina.

The plaintiffs further allege in their complaint in effect that they are deprived of their guaranty of due process of law under the Fourteenth Amendment to the Constitution of the United States, in that in the condemnation proceedings pending in the Superior Court of Stanly County, North Carolina, they have a right to litigate only on the question of the amount of damages they are entitled to receive for said lands and cannot there raise the question sought to be raised in this action.

The defendants filed an answer alleging in effect that they proposed to use the lands sought to be condemned as a school site for such individuals as are entitled to attend them under the laws of the land.

Defendants at the outset challenge the jurisdiction of the Court in this cause.

The case first came on for trial to the Court without a

jury on September 14, 1955, and was continued until September 22, 1955, for further hearing.

Briefs by the parties have been received, and now the Court, having considered the pleadings, arguments of counsel, the stipulations, exhibits, and briefs, makes and files herein its findings of fact and conclusions of law separately stated.

Findings of Fact

1. The plaintiffs are residents and citizens of Davidson County, North Carolina, and are taxpayers in Stanly County, North Carolina.

2. The defendants are the duly elected, qualified, and acting Trustees of the Albemarle City Administrative Unit, a public school administrative unit in Stanly County, North Carolina, with the exception of Claud Grigg, who is Superintendent of Public Instruction of said Administrative Unit.

3. The plaintiffs own certain lands situated partly within and partly without the boundaries of the Albemarle City Administrative Unit.

4. On November 20, 1954, the Trustees of the Albemarle City Administrative Unit instituted an action in the Superior Court of Stanly County, North Carolina, against Eliza Jane Doby and J. Lillian Doby, the plaintiffs in this cause, to condemn 26.972 acres of their said land as a site for school purposes under section 115-85, General Statutes of North Carolina, and other laws of said State applicable thereto. The petitioners or plaintiffs in said condemnation action are the same persons as the defendants in this cause except Ted Furr, who, since the institution of said action has become a member of the Board of Trustees of the Albe-

marle City Administrative Unit. Summons in the condemnation proceeding was served by publication and the Supreme Court of North Carolina in the case of *Brown, et al* vs. *Doby*, 242 N. C., 462, held that summons has been properly served in that cause.

5. The plaintiffs instituted this action on August 19, 1955.

6. The action in the Superior Court of Stanly County, North Carolina, is now, and was at the time that this action was instituted, pending.

CONCLUSIONS OF LAW

1. This Court does not have jurisdiction of the parties, or of the subject matter.

2. This is an action for permanent injunction to stay proceedings in a State Court prohibited by Section 2283, Title 28, United States Code.

3. The plaintiffs have not stated a claim arising under the Constitution, laws, or treaties of the United States.

4. The plaintiffs have not stated a claim of deprivation under color of any State law, statute, ordinance, regulation, custom, or usage of any right, privilege, or immunity secured by the Constitution of the United States.

Dated and signed this 4 day of Nov. 1955.

JOHNSON J. HAYES
Judge of the United States District Court for the Middle District of North Carolina

Opinion

The plaintiffs in their complaint allege that the defendants, school officials of the Albemarle School District, are seeking to condemn a tract of their land to be used as a public school site and on which to erect school buildings. They seek a declaratory judgment and to restrain the defendants from proceeding with the condemnation proceedings pending in the state court. They undertake to establish jurisdiction in this court on the ground of the Fourteenth Amendment and Section 1343 of Title 28 of the U. S. Code Annotated. The matter was heard for a preliminary injunction but at the time of hearing upon the affidavits, it was agreed that the case should be disposed of on its merits.

The real essence of the plaintiffs' complaint is a demand for an injunction to restrain the defendants from continuing the condemnation suit pending in the state court. They allege several reasons why the plaintiffs contend that that proceeding should be restrained. This court must determine, first of all, whether it has any jurisdiction to entertain the suit because nothing could be gained by a discussion of the case on its merits unless this court has jurisdiction. If jurisdiction exists under the allegations of the complaint, it would have to be based upon Section 1343 of Title 28 of U.S.C.A. This statute is commonly referred to as the Civil Rights Statute and has to do with the privileges and immunities of citizens or persons in the United States under and by virtue of the laws of the United States. Its history and purposes are fully set forth in *Hague* v. *C.I.O.* 307 U.S. 496. In a well considered opinion by Judge Chestnut in the case of *Norris* v. *City of Baltimore*, 78 Fed. Supp. 451, which is cited and approved by a three-judge court in *Reiling* v. *Lacey* 93 Fed. Supp. 462, the jurisdictional questions

under Title 28 U.S.C.A. Section 1343 are exhaustively stated and the conclusion is reached that this section deals only with the deprivation of Civil Rights as to which the amount in controversy is not essential. If, however, the suit is to enforce a federal right, which is not the deprivation of a civil right, it is necessary that the amount in controversy exceed $3000.00 as it does in cases of diversity of citizenship.

It does not appear in the plaintiffs' complaint that their tax liability in the school district, by virtue of the issuance of bonds, amounts to $3000.00. The tax of the plaintiffs is the basis for the determination of the amount in controversy and not the value of the property owned by them. *Colvin* v. *Jacksonville*, 158 U.S. 456. In the absence of an allegation that the amount of their tax liability under the so-called illegal school bonds would exceed ($3000.00) this court has no jurisdiction to entertain the cause of action and accordingly the case will be dismissed without prejudice.

The plaintiff also undertakes to establish jurisdiction in this court by alleging that the value of their land exceeds $3000.00 and that the defendants are undertaking to take it away from them by condemnation proceedings in the state court, contrary to the provisions of the Fourteenth Amendment. However, this court is not bound by their allegations of legal conclusions but it is the duty of the court to ascertain whether a bona fide controversy does exist in which this court has the right to take jurisdiction. *Robinson* v. *Anderson*, 121 U.S. 522 and *Defiance Water Co.* v. *Defiance*, 191 U.S. 184. General Statutes of N.C. 115-85 et sequor make ample provision for the ascertainment of damages in condemnation proceedings of property for public use and not only provide for the appointment of appraisers but provides for an appeal from the determination to the

Superior Court and to a trial before a jury on the value of property being taken. These statutes meet all of the requirements of due process and have been so well and so long determined that it is not necessary to cite any authorities other than *Abernathy* v. *Railroad*, 150 N.C. 97; *City of Oakland* v. *U.S.*, 124 F.2d 959; and *Hanson Lumber Co.* v. *U.S.*, 261 U.S. 581. The North Carolina statutes meet the requirements both of just compensation and due process under the Fourteenth Amendment to the United States Constitution.

The condemnation proceedings in the State of North Carolina was a proceeding *in rem* against the specific property. *U.S.* v. *Burnette*, 103 F.Supp. 645; *U.S.* v. *25,936 Acres*, 3rd Circuit, 153 F.2d 277; *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276. The state court acquired jurisdiction of the rem in the condemnation proceedings in spite of the dilatory action of the plaintiffs in their efforts to frustrate the state court in obtaining jurisdiction of the rem and over the plaintiffs. *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118. The history of that delay is set forth in *Brown* v. *Doby*, 242 N.C. 462. The plaintiffs unsuccessfully attempted in the state court to restrain the defendants from proceeding with the condemnation suit. *Mountain R. Ass'n* v. *Mount Mitchell Development Co.*, 183 N.C. 43. Having failed in the state court they filed this suit in effect to restrain the parties from proceeding in the state court.

If the other obstacles heretofore mentioned had been met by the plaintiffs, we could not entertain jurisdiction because we are forbidden to do so by Title 28 U.S.C.A. Sec. 2283. *Defiance Water Co.* v. *Defiance*, supra. It is appropriate to quote from the above case as follows:

"Litigation in the state courts cannot be dragged into

> the federal courts at such a stage, and in such a way. The proposition is wholly untenable that, before the state courts in which a case is properly pending can proceed to adjudication in the regular and orderly administration of justice, the courts of the United States can be called on to interpose on the ground that the state courts might so decide as to render their final action unconstitutional."

This court ought not to assume jurisdiction in a case of this nature unless clearly compelled to do so, because all the parties are citizens of the State of North Carolina and the issues relate primarily to school authorities and the law of North Carolina. The courts of the state are abundantly capable of determining the rights of all parties in interest. We have no reason to doubt that the state courts will follow the Constitution of the United States and safeguard everyone's rights. Whether the bond election was valid is a question to be determined by the law of North Carolina and the courts of the state are the proper forums in which to do it. Federal judges are ill-prepared to sit in judgment in every school squabble. *Brown* v. *Board of Education*, 347 U.S. 483 ruled that segregation was discriminatory but it did not require a federal judge to become a substitute for local school boards. The state still operates; it still pays the bills; it still retains control and so long as it does, the federal law will not interfere. The courts of the state are reluctant to interfere with the action of school boards in the performance of their discretionary powers. *Key* v. *Board of Education*, 170 N.C. 123. Certainly a federal court should not interfere except in cases of undoubted jurisdiction.

This the 4 of November, 1955.

(s) JOHNSON J. HAYES
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7137

ELIZA JANE DOBY and J. LILLIAN DOBY,
Appellants

v.

R. L. BROWN, JR., JOHN B. MORRIS, JR., J. HEATH MORROW, CHARLES W. PICKLER, H. WELLS ROGERS, TED FURR, Trustees of the Albemarle City Administrative Unit, and CLAUD GRIGG, Superintendent of Public Instruction of the Albemarle City Administrative Unit,
Appellees

Appeal from the United States District Court for the Middle District of North Carolina

Judgment

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said Dis-

trict Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

April 9th, 1956.

(s) JOHN J. PARKER
Chief Judge, Fourth Circuit.

Filed
Apr. 9, 1956
R. M. F. WILLIAMS, JR.
Clerk

Opinion

Parker, Chief Judge:

This is an appeal from an order dismissing a suit instituted by landowners to obtain a declaratory judgment as to their rights and to enjoin prosecution of the condemnation proceedings which were before the Supreme Court of North Carolina in *Brown* v. *Doby*, 242 N.C. 462, 87 S.E. 2d 921. The District Judge, in addition to holding that the jurisdictional amount was not involved in the case and that interference with an in rem action in a state court was asked, held that no federal question was involved either under the civil rights statute or otherwise and that, even if there were, the case was one of which the federal courts ought not assume jurisdiction, in view of the fact that the question related to the interpretation of a North Carolina statute which could be interpreted by the courts of the state in the pending condemnation proceedings. We find it unnecessary to go into the questions of amount involved or whether the state court had acquired jurisdiction over the property in an in

rem proceeding,* as we are of opinion that the District Judge was clearly right in holding that no federal question is involved in the case.

In their complaint the plaintiffs say that the condemnation of their land is not authorized because it is being condemned to provide a site for a school which is to be paid for with the proceeds of a bond issue which was authorized by a statute passed prior to the decision of the Supreme Court in the School segregation case, *Brown* v. *Board of Education*, 347 U.S. 483. The facts with respect to this are that the General Assembly of North Carolina on April 29, 1953, passed a statute, chapter 1162 of the Session Laws of 1953, authorizing the school district of the City of Albemarle in which plaintiffs' land is situate, to call a special bond election for the purpose of issuing bonds in the sum of $1,250,000 to be used in purchasing sites and erecting and equipping school buildings. On April 20, 1954, a special bond election was called pursuant to the statute and was held on June 8, 1954, resulting in a vote in favor of the bonds. On November 20, 1954, the condemnation proceeding was commenced to condemn plaintiffs' land under the general statute authorizing condemnation of land for school purposes, sec. 115-85 (now 115-125) of the General Statutes of North Carolina. They argue that condemnation of their land may not be had because the statute authorizing the bond issue must be construed as authorizing the proceeds to be used only for the purposes of segregated schools, which may not be lawfully conducted since the segregation decision. It is

* At the time of the entry of the judgment appealed from there had been no appeal from the appraisal of the Commissioner which was necessary to vest jurisdiction of a judicial proceeding in the Superior Court. Consequently the condemnation proceedings were in the administrative stage. *Burlington City Board of Education* v. *Allen*, 243 N.C. 520, 91 S.E. 2d 180.

perfectly clear, however, that the question thus presented is not one arising under the Constitution or laws of the United States but involves merely the interpretation and application of the state statute.

Brown v. *Board of Education, supra,* settled the law with respect to segregation in the schools. No party to this case is questioning the law as there laid down; and, if the question were raised, it could not be considered a substantial question in view of the unequivocal holding of the Supreme Court. The questions in the case before us are whether the statute authorizing the bond issue authorized the proceeds thereof to be used for the purposes of a non segregated school* and, if not, whether this would preclude the condemnation of the property of plaintiffs for school purposes under the general condemnation statute of the state. These are manifestly questions of state law and do not arise under the Constitution, under the civil rights statute or under any other law of the United States. The contention of plaintiffs is, not that what the defendants are doing is authorized by the State of North Carolina in defiance of the Fourteenth Amendment, but that it is not authorized by the state at all. This, however, does not present a controversy arising under the Constitution or laws of the United States. *Barney* v. *City of New York*, 193 U.S. 430, 437. The rule here applicable was thus stated by Chief Justice Fuller in *Defiance Water Company* v. *Defiance*, 191 U.S. 184, 190-191, viz.:

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* The Supreme Courts of Florida and Oklahoma and a Circuit Court in Virginia have passed upon somewhat similar questions in *Board of Public Instruction of Manatee County, Florida* v. *State of Florida et al.*, 75 So. 2d 832; *Matlock et al* v. *Board of County Com'rs of Wagoner County, Oklahoma, et al*, 281 P. 2d 169; *Shelton* v. *County School Board of Hanover County*, not reported. In both the Florida and Oklahoma cases, the bond issues were held valid while a contrary decision was reached in the Virginia case.

> "We have repeatedly held that 'when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground.' *Western Union Telegraph Co.* v. *Ann Arbor Railroad Co.*, 178 U.S. 239; *Gold Washing & Water Co.* v. *Keyes*, 96 U.S. 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U.S. 571; *Shreveport* v. *Cole*, 129 U.S. 36; *New Orleans* v. *Benjamin*, 153 U.S. 411, 424."

Even if a federal question should be held to be involved in the case, it would arise only in connection with the interpretation of state statutes which could be readily passed upon by the courts of the state in the pending condemnation proceedings, and the District Judge was correct in thinking that the federal court ought not assume jurisdiction to interpret and pass upon the state statutes in advance of their construction by the state courts. *Shipman* v. *DuPree*, 339 U.S. 321; *American Federation of Labor* v. *Watson*, 327 U.S. 582, 595-599; *New Orleans* v. *Benjamin*, 153 U.S. 411, 424; *Chicago and Alton R. Co.* v. *Wiggins Ferry Co.*, 108 U.S. 18, 24. In so far as the suit asked a declaratory judgment, and plaintiffs' brief in this court asserts that it was instituted under the Declaratory Judgments Act, 28 USC 2001, it is well settled that the granting of declaratory relief is a matter resting in the sound discretion of the trial judge and that it ought not be exercised to try a case

piecemeal or to drag into the federal courts matters properly triable before the courts of the state. *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U.S. 426, 431; *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 494-495; *Manufacturers Casualty Ins. Co.* v. *Coker*, 4 Cir. 219 F.2d 631; *Maryland Casualty Co.* v. *Boyle Const. Co.*, 4 Cir. 123 F. 2d 558; *Aetna Casualty Co.* v. *Quarles*, 4 Cir. 92 F.2d 321.

Affirmed.

APPENDIX D

1953 Session Laws
North Carolina
Chapter 1162

H. B. 1272

An Act to Authorize the Issuance of School Building Bonds and Notes in Behalf of the Albemarle City Administrative Unit as a Special Bond Tax Unit and the Levy of Taxes Within Such Unit for the Payment of the Principal and Interest of Such Bonds and Notes.

The General Assembly of North Carolina Do Enact:

Section 1. Upon receipt of a petition, signed by not less than ten per cent (10%) of the qualified voters of the territory embraced within the Albemarle City Administrative Unit and described in such petition, praying that bonds and/or notes be issued under the provisions of this Act, the Board of County Commissioners of Stanly County shall order a special election to be held in such school district for the purpose of voting upon the question of issuing bonds and/or notes and levying a sufficient tax for the payment thereof for the purpose of acquiring, erecting, enlarging, altering and equipping school buildings, including gymnasiums, agricultural buildings, shops, school cafeterias and other necessary buildings, and purchasing sites in such district or unit, or for any one or more of said purposes. In all such elections the board of county commissioners shall designate the polling place or places, appoint the registrars and judges, and canvass and judicially determine the results of the election upon filing with it of the election returns by the officers holding the election, and shall record such determination on their records, which

shall be conclusive of all the facts therein found and determined. The notice of election shall be given by publication at least three times in some newspaper published or circulating in such district or unit. The notice shall state the date of the election, the place or places at which the election will be held, the boundary lines of such district or unit, unless the district or unit is coterminous with a city, town or township (in which event the notice shall so state), the maximum amount of bonds and/or notes to be issued, the purpose or purposes for which the bonds and/or notes are to be issued, and the fact that a sufficient tax will be levied on all taxable property within the district or unit for the payment of the principal and interest of the bonds and/or notes. The first publication of the notice shall be at least thirty days before the election. A new registration of the qualified voters of such district or unit shall be ordered and notice of such new registration shall be deemed to be sufficiently given by publication once in some newspaper published or circulating in such district or unit at least thirty (30) days before the close of the registration books. This notice of registration may be considered one of the three notices required of the election. Such published notice of registration shall state the days on which the books will be open for registration of the voters and the place or places at which they will be open on Saturday. The books of such new registration shall close on the second Saturday before election. The Saturday before the election shall be challenge day and except as otherwise provided in this Act, such election shall be held in accordance with the laws governing general elections. The form of the question, as stated on the ballots, shall be in substantially the words: "For the issuance of $ School Bonds and/or Notes and the levying of a sufficient tax for the payment thereof," and "Against

the issuance of $ _____ School Bonds and/or Notes and the levying of a sufficient tax for the payment thereof." Such affirmative and negative form may be printed upon separate ballots, or both thereof may be printed on one ballot, containing squares opposite the affirmative and the negative forms, in one of which squares the voter may make a cross (X) mark. The petition herein provided for shall be filed with the Board of Commissioners of Stanly County and referred to the Board of Elections of Stanly County to determine the sufficiency thereof, and upon a finding by said board that the petition meets the requirements of this Section, the chairman of said board shall file a certificate to that effect with the Chairman of said Board of Commissioners of Stanly County.

Sec. 2. At the close of the polls the election officers shall count the votes and make returns thereof to the Board of County Commissioners of Stanly County, which board shall, as soon as practicable after the election, judicially pass upon the returns and judicially determine and declare the results of such election, which determination shall be spread upon the minutes of said board. The returns shall be made in duplicate, one copy of which shall be delivered to the Board of County Commissioners of Stanly County as aforesaid and the other filed with the Clerk of the Superior Court of Stanly County. The Board of County Commissioners of Stanly County shall prepare a statement showing the number of votes cast for and against the bonds and/or notes, and declaring the result of the election, which statement shall be signed by the chairman of the board and attested by the clerk, who shall record it in the minutes of the board and file the original in his office and publish it once in a newspaper published or circulating in such district or unit.

Sec. 3. No right of action or defense founded upon the invalidity of such election or the invalidity of any proceedings or steps taken in the creation of such district or such unit shall be asserted, nor shall the validity of such election or the validity of the creation of such district or such unit, or the right or duty to levy a sufficient tax for the payment of the principal and interest of such bonds and/or notes, be open to question in any court upon any ground whatever, except in an action or proceeding commenced within thirty (30) days after the publication of such statement of results as provided in the preceding Section.

Sec. 4. If a majority of the votes cast shall be in favor of the issuance of such bonds and/or notes and the levy of such tax, then the Board of Commissioners of Stanly County shall provide by resolution, which resolution may be finally passed at the same meeting at which it is introduced, for the issuance of such bonds and/or notes, which bonds and/or notes shall be issued in the name of the county, but shall be made payable exclusively out of the taxes to be levied in such district or such unit, except the Board of County Commissioners of Stanly County may pay from county funds any part of the principal and interest of said bonds and/or notes. They shall be issued in such form and denominations, and with such provisions as to the time, place and medium of payment of principal and interest as the Board of County Commissioners of Stanly County may determine, subject to the limitations and restrictions of this Act. They may be issued as one issue, or divided into two or more separate issues, and in either case may be issued at one time or in blocks from time to time. When bonds are to be issued, they shall be serial bonds and each issue thereof shall so mature that the aggregate

principal amount of the issue shall be payable in annual installments or series, beginning not more than three years after the date of the bonds of such issue and ending not more than thirty (30) years after such date. No such installment shall be more than two and one-half (2½) times as great in amount as the smallest prior installment, of the same bond issue. The bonds and/or notes shall bear interest at a rate not exceeding six per cent (6%) per annum, payable semiannually, and may have interest coupons attached, and may be made registerable as to principal or as to both principal and interest, under such terms and conditions as may be prescribed by said board. They shall be signed by the Chairman of the Board of County Commissioners of Stanly County, and the seal of the county shall be affixed to or impressed upon each bond and/or note and attested by the register of deeds or by the clerk of said board; and the interest coupons shall bear the printed, lithographed or facsimile signature of such chairman. The delivery of bonds and/or notes, signed as aforesaid by officers in office at the time of such signing, shall be valid, notwithstanding any changes in office occurring after such signing.

Sec. 5. The Board of County Commissioners of Stanly County is hereby authorized and directed to levy annually a special tax, ad valorem, on all taxable property in the district or in the special bond tax unit in which the election was held, sufficient to pay the principal and interest of the bonds and/or notes as such principal and interest become due. Such special tax shall be in addition to all other taxes authorized to be levied in such district or in such unit. The taxes provided for in this Section shall be collected by the county officer collecting other taxes and be applied solely

to the payment of principal and interest of such bonds and/or notes.

Sec. 6. In the event the boundary lines of the territory embracing the Albemarle City Administrative Unit are hereafter changed or altered, this Act shall apply to and within the territory embracing said unit at the time of the filing of the petition and the holding of the election as provided for in this Act. No change or alteration of the boundary lines of said unit shall in any way affect the validity of this Act.

Sec. 7. The powers conferred by this Act shall be regarded as supplemental and in addition to powers conferred by other laws and shall not supplant or repeal any existing powers for the issuance of bonds and/or notes, or any provisions of law for the payment of bonds and/or notes issued under such powers, or for the custody of moneys provided for such payment.

Sec. 8. This Act shall constitute full authority for the things herein authorized and no proceedings, publications, notices, consents or approvals shall be required for the doing of the things herein authorized, except such as are herein prescribed and required, and except that the provisions of the Local Government Act then in force as to the approval of the issuance of bonds and/or notes and endorsements of such approval upon such bonds and/or notes and as to the sale of bonds and/or notes and the disposition of the proceeds, shall be applicable to the bonds and/or notes authorized by this Act. The proceeds shall be paid out only upon order of the Board of Trustees of the Albemarle City Administrative Unit.

Sec. 9. This Act shall apply only to Albemarle City Administrative Unit and Stanly County.

Sec. 10. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 11. This Act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified, this the 29th day of April, 1953.

AUG 2
JOHN T. FEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 228

ELIZA JANE DOBY AND J. LILLIAN DOBY,
Petitioners,

vs.

R. L. BROWN, JR., JOHN B. MORRIS, JR., J. HEATH MORROW, CHARLES W. PICKLER, H. WELLS ROGERS, TED FURR, TRUSTEES OF THE ALBEMARLE CITY ADMINISTRATIVE UNIT, AND CLAUD GRIGG, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE ALBEMARLE CITY ADMINISTRATIVE UNIT,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Index to Brief:	
Jurisdictional Statement	1
Constitutional Provisions and Statutes Involved	2
Statement of Case	3
Argument:	
I. The decision below is not in conflict with any other decision of this or any lower federal court, and this case does not involve questions of importance which it is in the public interest to have decided by this Court	5
II. This is an action for permanent injunction to stay proceedings in a state court and is prohibited by 28 U. S. C. A., Section 2283	8
III. The petitioners have not stated a claim arising under the Constitution, Laws, or Treaties of the United States, or a claim of deprivation under color of any state law, statute, ordinance, regulation, custom, or usage of any right, privilege, or immunity secured by the Constitution of the United States	10
IV. No federal question is involved, and the federal court does not have jurisdiction of the subject matter	11
V. Questions raised involve only the state constitution and laws passed on by the state court adversely to claim of petitioners	12
VI. Decisions relied on by petitioners are inapplicable in this cause and do not establish a right to the granting of the writ	22
Conclusion	29

Page

Index to Appendix:

Appendix A:

Chapter 1372, 1955 Session Laws of North Carolina 1

Appendix B:

Stipulations of Counsel in District Court 2

TABLE OF CITATIONS

Cases:

Abernathy v. *Railroad*, 150 N. C. 97 13

A. F. of L. v. *Watson*, 327 U.S. 582, 90 L. Ed. 873, 66 S. Ct. 761 ..... 22, 25

Bell v. *Hood*, 372 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 29

Board of Education v. *Allen*, 243 N.C. 520 ..... 8, 13

Brown v. *Board of Education*, 347 U.S. 483 ..... 14, 22

Brown v. *Doby*, 242 N. C. 462 ..... 4, 9

California Oil, etc. Co. v. *Miller*, 96 F. 12 ..... 10, 11

Canada Malting Co. v. *Patterson Co.*, 285 U.S. 413, 422, 52 S. Ct. 413, 415 29

Carter v. *Atlanta & St. A. B. R. Co.*, 338 U.S. 430, 94 L. Ed. 236, at page 243 7

City of Oakland v. *United States*, 124 F. 2d 959 13

Commonwealth of Massachusetts v. *Missouri*, 308 U. S. 1, 19, 60 S. Ct. 39, 43 29

Colvin v. *Jacksonville*, 158 U. S. 456 10

Constantian v. *Anson County*, 244 N. C. 221 ..... 2, 14, 15, 22

Cuyahoga River Power Co. v. *Akron*, 240 U. S. 462, 36 S. Ct. 402, 60 L. Ed. 743 ..... 22, 24

Cuyahoga River Power Co. v. *Northern Ohio Traction & Light Co.*, 252 U. S. 388 ..... 10, 11

Davis v. *Wakelee*, 156 U. S. 680, 39 L. Ed. 578 ..... 23, 25

Defiance Water Co. v. *Defiance*, 191 U. S. 184 ..... 9, 11

Dial v. *Reynolds*, 96 U. S. 340, 24 L. Ed. 644 9

El Paso Water Co. v. *El Paso*, 152 U. S. 157 10

First National Bank of Columbus, Ohio, v. *La. Highway Commission*, 264 U. S. 308 ..... 10, 11

Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426, 46 S.

Page

Ct. 331, 70 L. Ed. 664 ..... 22, 25
Hague v. *C. I. O.*, 307 U. S. 496 10
Hamilton-Brown Shoe Co. v. *Wolf Bros. Co.* (1916), 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629 5
Hanson Lumber Co. v. *United States*, 261 U. S. 581 13
Home Tel. & Tel. Co. v. *City of Los Angeles*, 227 U.S. 278, 33 S. Ct. 312, 57 L. Ed. 510 ..... 22, 25
Langnes v. *Green*, 282 U. S. 531, 51 S. Ct. 243 29
Layne & Bowler Corp. v. *Western Well Works*, 261 U. S. 387, 67 L. Ed. 712, at 714 7
Magnum Import Co. v. *Coty*, 262 U. S. 159, 67 L. Ed. 922, at 924 7
Mosher v. *City of Phoenix*, 287 U. S. 29, 53 S. Ct. 67, 77 L. Ed. 148 ..... 22, 23, 24
Myers v. *Bethlehem Ship Building Co.* (1938), 303 U. S. 41, 58 S. Ct. 459 5
National Quarries Co. v. *Detroit T. & I. R. Co.*, 10 F. 2d 139 9
Norris v. *City of Baltimore*, 78 F. Supp. 451 11
North Laramie Land Co. v. *Hoffman*, 268 U. S. 276 12
Owensboro Waterworks Co. v. *Owensboro*, 200 U. S. 38, 26 S. Ct. 249 26
Power & Light Co. v. *City of Portland*, 181 F. 632 (218 U.S. 686, 31 S. Ct. 220) 25, 26
Reiling v. *Lacey*, 93 F. Supp. 462 11
Robinson v. *Anderson*, 121 U. S. 522 10
Rogers v. *Guaranty Trust Co.*, 288 U. S. 123, 130, 53 S. Ct. 295, 297 29
Seeley v. *Kansas City*, 31 F. Supp. 593 10
Shreveport v. *Cole*, 129 U. S. 36, 9 S. Ct. 210, 32 L. Ed. 589 9
Toucey v. *N. Y. Life Ins. Co.*, 314 U. S. 118 12
United States v. *Burnette*, 103 F. Supp. 645 12
United States v. *625.91 Acres of Land in Dunklin County, Mo.*, 49 F. Supp. 997 12
United States v. *25,936 Acres*, 153 F. 2d 277 12
Vicksburg S. & P. R. Co. v. *Nattin*, 58 F. 2d 979 10
Wilkerson v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413 6

State Statutes:

Page

General Statutes of North Carolina, Sec. 115-2 3
General Statutes of North Carolina, Sec. 115-85 and 125 ..... 3, 4, 9, 13, 28
Chapter 1162, 1953 Session Laws of North Carolina, ... 5, 13, 28
Chapter 1372, 1955 Session Laws of North Carolina, ... App. A

Federal Statutes:

Title 28, U. S. C. A., Sec. 1254, Clause 1 1
Title 28, U. S. C. A., Sec. 2283 ..... 2, 8, 9
Title 28 U. S. C. A., Sec. 1331 10
Title 28 U. S. C. A., Sec. 1343 10
Title 28, U. S. C. A., Sec. 41 (8) 25

Constitution:

North Carolina Constitution, Article IX, Section 2 2

Rules of Court:

Rule 19 (1) of the Revised Rules of the Supreme Court of the United States 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 228

ELIZA JANE DOBY AND J. LILLIAN DOBY,
Petitioners,

vs.

R. L. BROWN, JR., JOHN B. MORRIS, JR., J. HEATH MORROW, CHARLES W. PICKLER, H. WELLS ROGERS, TED FURR, TRUSTEES OF THE ALBEMARLE CITY ADMINISTRATIVE UNIT, AND CLAUD GRIGG, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE ALBEMARLE CITY ADMINISTRATIVE UNIT,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Jurisdictional Statement

The Petitioners seek to invoke the jurisdiction of this Court under 28 U. S. C. A., Section 1254, Clause 1, and

have performed certain procedural details in apt time. Nevertheless, the Respondents respectfully submit that the Petition for Writ of Certiorari should be denied for the following reasons:

(1) The decision below is not in conflict with any other decision of this or any lower Federal Court, and this case does not involve questions of importance which it is in the public interest to have decided by this Court.

(2) This is an action for permanent injunction to stay proceedings in a State Court and is prohibited by 28 U. S. C. A., Section 2283.

(3) The Petitioners have not stated a claim arising under the Constitution, laws, or treaties of the United States, or a claim of deprivation under color of any State law, statute, ordinance, regulation, custom, or usage of any right, privilege, or immunity secured by the Constitution of the United States.

(4) No federal question is involved, and the Federal Court does not have jurisdiction of the subject matter.

(5) Questions raised involve only the State Constitution and laws passed on by the State Court adversely to claim of Petitioners.

(6) Decisions relied on by petitioners are inapplicable in this cause and do not establish a right to the granting of the Writ.

Constitutional Provisions and Statutes Involved

1. The Supreme Court of North Carolina, in *Constantian* v. *Anson County*, 244 N. C., 221, exscinded from the Constitution of North Carolina all requirements of segregated schools, and so much of Article IX, Section 2 as quoted by the Petitioners on page 4 of their Petition which relates to segregated schools is not involved in this action.

2. The General Assembly of North Carolina at its session in 1955 repealed General Statutes of North Carolina Section 115-2 quoted in the Petitioners' Petition page 4, and that Section is not involved in this action. (Appendix A, Page 1.)

Statement of Case

The Petitioners' action in essence involves certain lands owned by them, which the Respondents, as public school authorities, seek to condemn for a site for school purposes. All parties are citizens and residents of North Carolina.

That the Court may clearly see that the Petitioners, rather than seeking the protection of some constitutional right, are, in fact, seeking only to prevent the condemnation of their land under the laws of the State of North Carolina, facts other than those stated by the Petitioners and hereinafter stated are considered essential.

Proper notice was issued and served by the Respondents on the Petitioners pursuant to Section 115-85 (now 115-125), General Statutes of North Carolina, in October, 1954. Before the time expired for the filing of application under said Section, the Petitioners instituted an independent action in the Superior Court of Stanly County and obtained a temporary restraining order prohibiting the Respondents from proceeding further in said condemnation proceeding. The temporary restraining order was dissolved and judgment of voluntary non-suit was taken in said independent action. Immediately thereafter, the Petitioners and the Respondents unsuccessfully negotiated for the purchase and sale of the lands in question. Upon failure to negotiate successfully, the Respondents instituted a special proceeding in the Superior Court of Stanly County, North Carolina, to condemn said lands and summons was issued therein on November 20, 1954. Summons in that proceeding was served by publication on the Petitioners for that they

could not be found after due diligence in the State of North Carolina. Further delay in the condemnation proceeding was experienced as a result of a special appearance made by the petitioners therein to the effect that the Court had not acquired jurisdiction of their person, and from an adverse judgment of the Clerk of the Court thereon, the Petitioners appealed to the Judge of the Superior Court in term time. From an adverse judgment of the Superior Court, the Petitioners appealed to the Supreme Court of North Carolina, and that Court, in *Brown, et al.* v. *Doby*, 242 N. C., 462, held that the Petitioners had been properly subjected to the jurisdiction of the Court. Then, the Petitioners filed an answer in that proceedings seeking to raise the same questions sought to be raised here. On August 19, 1955, the Petitioners commenced this action in the United States District Court for the Middle District of North Carolina.

When the matter came on for hearing before Honorable Johnson J. Hayes, United States District Judge, the Petitioners judicially stipulated, "that at the time of the institution of this action there was, and at this time there is, pending in the Superior Court of Stanly County a condemnation proceeding instituted by the Trustees of the Albemarle City Administrative Unit and the Superintendent of Public Instruction against Eliza Jane Doby and J. Lillian Doby for the purpose of condemning the same lands referred to in this Federal Court action." It is so alleged in their complaint. (Petition, Appendix A, Paragraph 21, at page 7.)

At the present time the special proceedings for condemnation of said lands is on appeal to the Supreme Court of North Carolina by the Petitioners here from an adverse judgment on the questions sought to be raised in this action.

The condemnation proceedings are instituted pursuant to G. S. 115-125 and other statutes, rather than under Chapter

1162 of the North Carolina Session Laws of 1953, which is not related to the authority of the Respondents to condemn lands for school sites, and it is the latter statute of which the Petitioners question the validity.

ARGUMENT

I

The decision below is not in conflict with any other decision of this or any lower federal court, and this case does not involve questions of importance which it is in the public interest to have decided by this Court.

The Petitioners admit (Petition, P. 6) that "We are not here confronted with conflicting decisions of various Circuit Courts on the same matter."

This Court has many times stated that the jurisdiction to review by certiorari the judgment and decrees of the Circuit Courts of Appeals is one "to be exercised sparingly and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.* (1916) 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629; *Myers* v. *Bethlehem Ship Building Co.* (1938) 303 U. S. 41, 58 S. Ct. 459.

The Petitioners in this cause have used every legal machination possible to prohibit and prevent the Respondents from condemning their lands, ignoring the processes and jurisdiction of the State Courts as long as they could, by legal skirmish, do so. When they could no longer accomplish their objective in the State Courts, they commenced this action in the Federal Court, seeking to raise the same questions sought to be raised in the condemnation proceeding and for the purpose of preventing the Respondents from condemning their lands.

This case assumes importance only in the eyes of the

parties involved. That is not the importance that the eyes of the law must discover before the granting of writ of certiorari is permissible. The importance which the law attaches to such cases is that which directly relates to our Federal system. Here we find neither peculiar gravity or general importance, and importance of the outcome merely to the parties is not enough. Otherwise, a grave and unwarranted burden would be imposed upon the jurisdiction of this Court.

We believe that the Court's general attitude toward petitions for certiorari in cases of this kind is established by the cases and the Rules of this Court hereinafter cited and quoted.

Mr. Justice Frankfurter, in his dissenting opinion in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, succinctly, but comprehensively, sets forth the Rule as follows:

> "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts, even though those facts may have been erroneously appraised. . . . For this Court to take a case which turns merely on such an appraisal of evidence, however much hardship in the fallible application of an archaic system of compensation for injuries to railroad employees may touch our private sympathy, is to deny due regard to the considerations which led the Court to ask and Congress to give the power to control the Court's docket. Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome

merely to the parties is not enough. It has been our practice to dismiss a writ of certiorari even after it was granted, where argument exposed a want of conflict or revealed that the case involved no more than its particular facts."

In *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 94 L. ed. 236, at page 243, it was stated in a concurring opinion:

> "I would therefore dismiss the writ as improvidently granted. By not doing so, the Court encourages petitions of this character instead of discouraging them. The Court should save its energy for cases it necessarily must adjudicate in order to adjudicate them with due regard for the needs of the deliberative process. The only effective way to respect these considerations is to cease acquiescence in their disregard."

In *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 67 L. ed. 712, at 714, Mr. Chief Justice Taft said:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Also, in *Magnum Import Company* v. *Coty*, 262 U. S. 159, 67 L. ed. 922, at page 924, the Court stated:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeal was given for two purposes; first, to secure uniformity of decision between these courts in the nine circuits; and, second,

to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Rule 19 (1) of the Revised Rules of the Supreme Court provides:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

II

This is an action for permanent injunction to stay proceedings in a state court and is prohibited by 28 U. S. C. A., Section 2283.

The Petitioners, in their Petition, (Petition, P. 8) state that at the time this action was instituted in the United States District Court, no court proceeding had been instituted in the State Court for that the condemnation proceedings were only in an administrative stage, citing *Burlington City Board of Education* v. *Allen*, 243 N. C. 520, 91 S. E. (2) 180.

We direct the attention of the Court to the fact that the condemnation proceedings in *Burlington City Board of Education* v. *Allen, Supra*, were entirely different from the proceedings in condemnation instituted by the Respondents against the Petitioners in the Superior Court of Stanly County, North Carolina. The latter was a special proceedings in which summons was issued and served along

with a copy of the petition; (see *Brown* v. *Doby, Supra*) whereas, in the former case, only notice was issued and served pursuant to Section 115-125, General Statutes of North Carolina. Furthermore, the petitioners judicially stipulated (Appendix B, Page 2) that the condemnation proceeding was pending in the State Court at the time of the institution of this action, and the District Judge found as a fact that said action was so pending. (Petitioners' Appendix B, Page 13).

Section 2283, Title 28, United States Code provides as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."

In *Defiance Water Co.* v. *Defiance,* 191 U. S. 184, 24 S. Ct. 63, 48 L. ed. 140, the Court said:

> "Litigation in the state courts cannot be dragged into the federal courts at such a stage, and in such a way. The proposition is wholly untenable that, before the state courts in which a case is properly pending can proceed to adjudication in the regular and orderly administration of justice, the courts of the United States can be called on to interpose on the ground that the state courts might so decide as to render their final action unconstitutional."

See also *Dial* v. *Reynolds,* 96 U. S. 340, 24 L. ed. 644; *Shreveport* v. *Cole,* 129 U. S. 36, 9 S. Ct. 210, 32 L. ed. 589.

The Petitioners have alleged no equitable grounds for intervention of the Federal Court. *National Quarries Co.* v. *Detroit T. & I. R. Co.,* 10 F. (2d) 139.

III

The petitioners have not stated a claim arising under the Constitution, Laws, or Treaties of the United States, or a claim of deprivation under color of any state law, statute, ordinance, regulation, custom, or usage of any right, privilege, or immunity secured by the Constitution of the United States.

The petitioners cannot maintain this action under Title 28, U. S. C. A., Section 1331, for that they have failed to establish either a matter in controversy in excess of the sum or value of $3,000.00, or present a substantial federal question, both of which are necessary by the provisions thereof. *Colvin* v. *Jacksonville*, 158 U. S. 456; *Vicksburg, S. & P. R. Co.* v. *Nattin*, 58 F. 2d 979; *El Paso Water Co.* v. *El Paso*, 152 U. S. 157; *Seeley* v. *Kansas City*, 31 F. Supp. 593; *First National Bank of Columbus, Ohio* v. *La. Highway Commission, et al.* (1924) 264 U. S. 303; *California Oil etc. Co.* v. *Miller*, 96 F. 12; *Cuyahoga River Power Co.* v. *Northern Ohio Traction & Light Co.*, 252 U. S. 388; *Robinson* v. *Anderson*, 121 U. S. 522.

Section 1343, Title 28 U. S. C. A., commonly known as the Civil Rights Statute, grants jurisdiction to District Courts in civil actions authorized by law to be commenced by any person to redress the deprivation under color of any State law, statute, ordinance, regulation, custom, or usage of any right, privilege or immunity secured by the Constitution of the United States, or by Act of Congress providing for equal rights of citizens, or of all persons, within the jurisdiction of the United States.

The Petitioners cannot successfully invoke here this Statute, because the provisions thereof are inapplicable. *Hague* v. *C. I. O.*, 307 U. S. 496.

The entire matters alleged in this action relate only to the

Petitioners' property and not to a personal, constitutional right within the contemplation and meaning of said Statute. *Norris* v. *City of Baltimore,* 78 F. Supp. 451; *Reiling* v. *Lacey,* 93 F. Supp. 462.

IV

No federal question is involved, and the federal court does not have jurisdiction of the subject matter.

There is no substantial federal question involved in this action, because there exists neither an actual dispute between the parties as to the meaning of some law of the United States, nor the materiality of the construction of such law to a determination of the cause. Both elements are required to vest jurisdiction in the Federal Court. *California Oil, etc. Co.* v. *Miller,* 96 F. 12; *Cuyahoga River Power Co.* v. *Northern Ohio Traction & Light Co.,* 252 U. S. 388; *First National Bank* v. *La. Highway Commission,* 264 U. S. 308.

In *Defiance Water Co.* v. *Defiance, supra,* the Court said:

> " 'When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground . . .' "
>
> " 'The judicial power extends to all cases in law and equity arising under the Constitution, but these are

cases actually and not potentially, arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the Constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require.' "

It is obvious from the complaint and the facts in this case that the Petitioners are not in good faith seeking answer to any constitutional or federal question; that in truth and fact no *bona fide* controversy exists between the parties; but rather Petitioners seek, by procedural maneuvers, to prohibit the Respondents from, and delay them in, the condemnation proceedings pending in the Superior Court of Stanly County, North Carolina.

Furthermore, the Rule of law that in actions *in rem* the Court, whether Federal or State, each having concurrent jurisdiction, which first takes possession of the *res* withdraws the property from the reach of the other courts is apposite in this action. *Toucey* v. *N. Y. Life Ins. Co.*, 314 U. S. 118; *United States* v. *625.91 Acres of Land in Dunklin Co., Missouri*, 49 F. Supp. 997; *U. S.* v. *Burnette*, 103 F. Supp. 645; *N. Laramie Land Co.* v. *Hoffman*, 268 U. S. 276; *U. S.* v. *25,936 Acres*, 153 F. 2d 277.

V

Questions raised involve only the state constitution and laws passed on by the state court adversely to claim of petitioners.

The Petitioners say that they do not attack the mechanics or procedure employed by the Respondents, but contend that the authority under which the Defendants purport to act is unconstitutional and as such deprive the plaintiffs of their property without due process of law guaranteed to them by the Fourteenth Amendment to the Federal Constitution.

The Petitioners confuse the authority under which the Respondents are condemning the lands in question. They predicate their complaint upon Chapter 1162 of the 1953 Session Laws of North Carolina. This Statute relates only to the authority of the County Commissioners to call a special election for the issuance of school bonds in the Albemarle City Administrative Unit, and to issue them upon favorable vote. The Petitioners' lands are being condemned under Section 115-125, General Statutes of North Carolina, and other related statutes. The Plaintiffs admit in their complaint (Petition, Appendix A, Paragraph 21, at page 7) that they are entitled to be heard by a court and jury on the question of compensation and damages. Therefore, the Statute does not violate any constitutional rights of the Plaintiffs, and it meets the requirements of both just compensation and due process of law under the Fourteenth Amendment to the Constitution of the United States. *Abernathy* v. *Railroad,* 150 N. C. 97; *City of Oakland* v. *United States,* 124 F. 2d 959; *Hanson Lumber Co.* v. *United States,* 261 U. S. 581; *Board of Education* v. *Allen,* 243 N. C. 520.

As was stated in the Opinions of the District and Circuit Courts, the questions which the Petitioners seek to raise are to be determined by the law of North Carolina and the courts in that State are the proper forum in which to do it. (Petition, Appendix, pp. 18 and 23)

Judge Parker correctly said: (Petition, Appendix C, Page 26)

> "The questions in the case before us are whether the statute authorizing the bond issue authorized the proceeds thereof to be used for the purposes of non-segregated schools, and, if not, whether this would preclude the condemnation of the property of plaintiffs for school purposes under the general condemnation statute of the state. These are manifestly questions of state law and do not arise under the Constitution, under the civil rights statute or under any other law of the United States."

These very questions have in effect been answered negative to the claim of the petitioners by the Supreme Court of North Carolina in *Constantian* v. *Anson County,* 244 N. C. 221.

There is no state constitutional, statutory, or court decision requiring the separation of the races in the public schools of North Carolina. The Supreme Court of North Carolina in *Constantian* v. *Anson County, Supra,* in an able and lucid opinion by Justice William H. Bobbitt, held that the effect of the decision in *Brown* v. *Board of Education, Supra,* was to invalidate that portion of the North Carolina Constitution relating to the separation of the races in the public schools

Long before the decision in the *Constantian case,* the General Assembly of North Carolina had rewritten the entire statutory school law and had eliminated all requirements of, and references to, the separation of the races. (Appendix A, Page 1).

The Constitution and laws of North Carolina require a uniform system of schools wherein tuition is free to all children of the State between certain ages. Consequently, the petitioners claim that they are entitled to restrain the condemnation of their lands under the decisions of the *Segregation Cases* is without merit.

Constantian v. *Anson County, Supra,* was a taxpayers' action to enjoin the defendant from issuing and selling capital outlay school bonds voted in a special election held in 1952 to be used in segregated schools. Among other reasons, the validity of the bonds was attacked on the grounds that the decision of the *Segregation Cases* had rendered them void. The trial court held that upon issuance of the bonds they would be valid obligations of the county. The judgment was affirmed on appeal. In writing the Opinion, Justice Bobbit said:

> "These propositions are well established. Article IX, section 2, contains a mandate that the General Assembly provide for a State public school system. Article IX, section 3, contains a mandate that the board of commissioners of each county in the State provide the funds for the buildings and equipment necessary for the maintenance and operation of schools within the county for the constitutional term. *Marshburn v. Brown,* 210 N. C. 331,186 S. E. 265. Full responsibility for the administration of school affairs and the instruction of children within each administrative unit, including the assignment of pupils to particular schools, rests upon the school authorities of such unit. *Parker v. Anson County, supra,* and cases cited. In short, when the board of commissioners provides the funds for the necessary buildings and equipment, it has no further responsibility or authority. The school authorities within each administrative unit have full responsibility and authority in respect of the school program.
>
> "It was the duty of the Board of Commissioners of Anson County to provide the funds for necessary plant facilities. The bond order set forth in express terms that $1,250,000 was needed for that purpose. The

Board of Commissioners and the electorate authorized the bond issue to provide the funds necessary for such additional plant facilities. Nothing appears in this record to suggest that the needs are less in 1956 than in 1952. Indeed, the court below incorporated in the judgment a finding of fact, to which no exception was taken, that 'additional school plant facilities for the public school system in Anson County are urgently needed now.' When the bonds were authorized, the sole purpose in mind was to provide funds to meet the over-all capital outlay needs in respect to all school children of Anson County, white and colored. The school program, as distinguished from plant facilities, was not in issue or involved.

"An entirely different question was presented to this Court in *Mauldin v. McAden*, 234 N. C. 501, 67 S. E. 2d 647, and *Gore v. Columbus County*, 232 N. C. 636, 61 S. E. 2d 890, and *Feezor v. Siceloff*, 232 N. C. 563, 61 S. E. 2d 714, and *Waldrop v. Hodges*, 230 N. C. 370, 53 S. E. 2d 263, and *Atkins v. McAden*, 229 N. C. 752, 51 S. E. 2d 484. In those cases, decision turned on whether subsequent findings in the light of changing educational needs warranted the transfer or reallocation of funds from one project to another within the general purpose (school plant facilities) for which the bonds were authorized. Here there is no suggestion that the funds to be derived from the sale of the unissued bonds ($750,000) are to be transferred or reallocated from one project to another within the general purpose for which the bonds were authorized.

"The phrase, *suitable for colored children*, used in connection with projects (5) and (6), connotes nothing beyond the fact that it was then contemplated that these would make available additional plant facilities wherein colored children would be taught. Obviously,

physical school plant facilities and equipment are suitable for the teaching of children, irrespective of race or color.

"We come now to the contention upon which plaintiff places major emphasis. It is this: When the bonds were authorized, Article IX, section 2, as construed by this Court, contained the *mandatory requirement* that children of the white race and children of the colored race be taught in separate schools. *Puitt v. Commissioners*, 94 N. C. 709; *Lowery v. School Trustees, supra.* Moreover, the validity of such mandatory requirement had the sanction of decisions of the Supreme Court of the United States; for, as late as 1927, *Chief Justice Taft*, speaking for a unanimous Court, had explicitly declared that each state had the right and discretion to determine, in respect of its public school system, whether the children of different races should be taught in the same or separate schools, 'the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution.' *Gong Lum v. Rice*, 275 U.S. 78, 72 L. Ed. 172, 48 S. Ct. 91. However, in 1954 the Supreme Court of the United States declared that the *enforced* separation of Negroes and whites in public schools *solely on the basis of race* denied to Negroes equal protection of the laws (*Brown v. Board of Education of Topeka*, 347 U. S. 483, 98 L. Ed. 873, 74 S. Ct. 686, 38 A. L. R. 2d 1180), and in its 1955 decision applied the proposition so declared to the cases before it (*Brown v. Board of Education of Topeka*, 349 U. S. 294, 99 L. Ed. 1085, 75 S. Ct. 753). The bonds were authorized when it was contemplated that children of the white race and children of the colored race would be taught in separate schools in compliance with Ar-

ticle IX, section 2, and not otherwise. Hence, the argument runs, both the bond order and the election were invalidated by the unprecedented action of the Supreme Court of the United States; for, plaintiff insists, if the school authorities cannot operate the schools in compliance with Article IX, section 2, there is no authority to provide additional school plant facilities when no lawful use thereof can be made for school purposes.

"The Fourteenth Amendment to the Constitution of the United States provides, in part, that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' The limitation is upon the exercise of governmental power by a state or state agency. This is well settled and fundamental.

"No provision of the Constitution requires that a state maintain a system of public schools, whether attendance be compulsory or voluntary. This is exclusively a matter of state policy. Moreover, in respect of a state public school system, nothing in the *Brown case* requires that children of different races be taught in the same schools. The doctrine therein declared, to be put into effect in specific cases 'with deliberate speed' as conditions may warrant, is that no child, whatever his race, may be excluded from attending the school of his choice solely on the basis of race. If so excluded by the state or a state agency, he may assert his constitutional rights under the equal protection clause of the Fourteenth Amendment as interpreted in the *Brown case*. In substance, this is the interpretation placed upon the *Brown case* by the three-judge district court, composed of *Parker* and *Dobie, Circuit Judges*, and *Timmerman, District Judge*, upon rendering their decision 15 July, 1955, in *Briggs v. Elliott*, 132 F. Supp. 776. No one can now foretell in what

localities or in what buildings or to what extent children of the white race and children of the colored race will be taught in the same public schools in North Carolina.

"The impact of the decisions in the *Brown case*, in respect of the *operation* of public schools in Anson County, applies equally to the school plant facilities existent prior to the bond order and election, the school plant facilities provided by the bonds sold ($500,000) and the school plant facilities to be provided by the proceeds from the sale of the unissued portion ($750,000) of the authorized issue of $1,250,000. In this respect, there is nothing distinctive about the uncompleted projects for which the bonds were authorized.

"If plaintiff's contention were adopted, all authorized (unissued) bonds for school plant facilities, as well as all previously authorized special tax supplements within administrative units, throughout the State, would be invalidated. Applicable legal principles impel the opposite conclusion.

"The mandate to the General Assembly (Article IX, section 2), and the mandate to the board of commissioners of each county (Article IX, section 3,) discussed above, were part and parcel of the original (unamended) Constitution of 1868. These are the constitutional mandates upon which our public school system is based. See, also, Constitution of North Carolina, Article I, section 27; Article IX, sections 1, 4, 5, 8, 9, and 11. It was the amendment of 1875, which provided that, in obeying the original mandates, a specific method was required, namely, that 'the children of the white race and the children of the colored race shall be taught in separate public schools.' Only that portion of the 1875 amendment which purports to make *mandatory* the *enforced* separation of the races in the

public schools is now held violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Otherwise, the mandates of Article IX, sections 2 and 3, remain in full force and effect. The provisions thereof, absent the mandatory requirement of enforced separation, are complete in themselves and capable of enforcement. Their separable and independent status is manifest. They antedate the 1875 amendment. They survive the invalidation of the mandatory requirement of enforced separation contained in the 1875 amendment.

"Now as in 1952, Article IX, section 2, is a mandate that the General Assembly provide for a State public school system. Now as in 1952, Article IX, section 3, is a mandate to the board of commissioners of each county in the State to provide the funds for the buildings and equipment necessary for the maintenance and operation of public schools within the county for the minimum term.

"'A statute may be valid in part and invalid in part. If the parts are independent, or separable, but not otherwise, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement.' 82 C. J. S., Statutes sec. 92. Our decisions are in accord. *R.R.* v. *Reid*, 187 N. C. 320, 121 S. E. 534; *Lowery* v. *School Trustees*, *supra*. This well established rule applies equally when a portion of a state constitution or any provision thereof is invalid as violative of the Constitution of the United States.

"The final (contradictory) contention of plaintiff is that, assuming that teaching of children of the white race and of the colored race in the same school is now permissible under the decision in the *Brown*

case, the issuance of the bonds ($750,000) is for an unlawful purpose under North Carolina law. The fallacy underlying this contention is that the mandatory requirement as to enforced separation, incorporated in Article IX, section 2, by the 1875 amendment, is no longer the law in North Carolina.

"Our deep conviction is that the interpretation now placed on the Fourteenth Amendment, in relation to the right of a state to determine whether children of different races are to be taught in the same or separate public schools, cannot be reconciled with the intent of the framers and ratifiers of the Fourteenth Amendment, the actions of the Congress of the United States and of state legislatures, or the long and consistent judicial interpretation of the Fourteenth Amendment. However that may be, the Constitution of the United States takes precedence over the Constitution of North Carolina. Constitution of North Carolina, Article I, section 3 and 5; Constitution of the United States, Article VI. In the interpretation of the Constitution of the United States, the Supreme Court of the United States is the final arbiter. Its decision in the *Brown case* is the law of the land and will remain so unless reversed or altered by constitutional means. Recognizing fully that its decision is authoritative in this jurisdiction, any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid.

"The Florida Supreme Court, in *Board of Public Instruction* v. *State*, 75 So. 2d 832, and the Supreme Court of Oklahoma, in *Matlock* v. *Board of County Commissioners*, 281 P. 2d 169, on similar but somewhat variant factual situations, have reached conclusions generally in accord with the decision of this Court."

The decision in the *Segregation Cases* did not strike down the authority of school administrative units in North Carolina to issue bonds for school purposes simply because the State Constitution contained a provision for the separation of the races in the public schools. Rather, that decision struck out the provisions of the State Constitution relating to segregated schools.

The Supreme Court of North Carolina so held in the *Constantian case,* and if there is authority to issue bonds for school purposes, there must exist authority to construct school buildings.

The State Court has exscinded from the State Constitution the requirement of segregated schools and has established the validity of all school bonds under the North Carolina Constitution and laws, whether voted before or after the decision in the *Segregation Cases,* as against the claim of invalidation as a result of that decision. Thus, the petitioners' claim that the condemnation of their lands is not authorized because it is being condemned to provide a site for a school which is to be paid for with the proceeds of a bond issue which was authorized by a statute passed prior to the decision of the Supreme Court segregation case, *Brown* v. *Board of Education, supra,* is without legal foundation.

VI

Decisions relied on by petitioners are inapplicable in this cause and do not establish a right to the granting of the writ.

Petitioners cite *Mosher* v. *City of Phoenix,* 287 U. S. 29, 53 S. Ct. 67, 77 L. Ed. 148; *Cuyahoga River Power Co.* v. *Akron,* 240 U. S. 462, 36 S. Ct. 402, 60 L. Ed. 743; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 46 S. Ct. 331, 70 L. Ed. 664; *A. F. of L.* v. *Watson,* 327 U. S. 582, 90 L. Ed. 873, 66 S. Ct. 761; *Home Telephone & Telegraph Co.* v.

City of Los Angeles, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510; and *Davis* v. *Wakelee,* 156 U. S. 680, 39 L. Ed. 578, as authority in support of their argument of reasons for granting the Writ.

In *Mosher* v. *City of Phoenix, supra,* the petitioner instituted actions to restrain the City from appropriating her lands for street purposes. There being no diversity of citizenship, jurisdiction of the court depended upon the presentation of a substantial federal question in the bills of complaint. The district court dismissed the bills for want of jurisdiction. The circuit court of appeals affirmed. Writ of certiorari was granted, limited to the question of jurisdiction of the district court.

The Supreme Court held that a substantial federal question had been presented, but this determination was not predicated upon the bare allegation, as is the present case, that the City was proceeding under invalid State law or without authority under State law, but upon the further allegation that the City was attempting to take the property of the plaintiff without compensation and appropriate it in violation of rights guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States.

In answer to the holding of the lower court that the petitioner having alleged that the proceedings were void under State law had not presented a substantial federal question, the Court said:

> ". . . But Petitioner did not stop with allegations as to the city's authority under state law. Petitioner also alleged in No. 6, after setting forth her title, her claim as to the width of the street in question, and the action of the city in including her property as a part of the street, and in contracting for the street improvement upon that basis, that the city was thereby

> 'attempting to take and appropriate the property of plaintiff without compensation, and to take and appropriate and use same and deprive the said plaintiff of the permanent use thereof without due process of law, or any process of law, . . .' "

There can be no doubt but that the questions the petitioners seek to raise in this cause are "questions of State law and do not arise under the Constitution, under the Civil Rights Statute or any other law of the United States. The contention of the plaintiffs is, not that what the defendants are doing is authorized by the State of North Carolina in defiance of the Fourteenth Amendment, but that it is not authorized by the State at all. This, however, does not present a controversy arising under the Constitution or laws of the United States. *Barney* v. *City of New York*, 193 U. S. 430, 437."

In *Cuyahoga River Power Co.* v. *City of Akron, Supra*, the petitioner sought injunctive relief against the defendant to prevent it from appropriating waters on a stream where its plant was located, and the Court, in reversing the decree dismissing the case, said:

> "It appears to us that sufficient attention was not paid to other allegations of the bill. After setting out various passages from the statutes and Constitution of Ohio, and concluding that the city has no constitutional power to take the property and franchises that the plaintiff is alleged to own, or any property for a water supply, it alleges that the city does not intend to institute any proceedings against the plaintiff, but intends to take its property and rights without compensation; . . ."

The *Mosher* and *Cuyahoga* cases in fact support the contention of the defendants that all questions raised in-

volve the interpretation and application of the state laws.

Neither *Fidelity & Deposit Co.* v. *Tafoya, supra,* nor *A. F. of L.* v. *Watson, supra,* has any bearing on the questions presented in this cause. The former case deals with the validity of a statute providing for suspension of an insurance company's license to do business in the state, if it paid fees or emoluments to a person not a resident of the state on business written within the state. The latter deals with the question of enjoining the enforcement of an amendment to the state Constitution to the effect that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, and jurisdiction of the federal court was maintained under 28 U. S. C. A. 41 (8) relating to suits and proceedings arising under any law regulating commerce.

Home Telephone Co. v. *City of Los Angeles, supra,* is a confiscatory rate case and has no applicability here.

Davis v. *Wakelee, supra,* is a diversity of citizenship case involving the restraint of the defendant from setting up in a proposed action at law a threatened defense on the ground of equitable estoppel and could be no authority for the petitioners' contention.

The petitioners say (Petition, p. 11): "If the defendants are acting under invalid powers the attempt to deprive the plaintiffs of their land constitutes a violation of due process of law and the court has the power and the duty to inquire into the power under which the defendants purport to proceed," citing *Power & Light Co.* v. *City of Portland,* 181 F. 632.

The fallacy in this statement is that it is not a correct statement of the law as the defendants interpret it.

Power & Light Co. v. *Portland, supra,* strangely enough was appealed by the Power Company who won in the lower

court and was dismissed on motion of counsel for the appellants. Consequently, the appeal must have been taken from some judgment or order other than that reported in 181 F. 632, and for that reason could not within the realm of reason be interpreted in so far as the decision of the United States Supreme Court is concerned as authority for any holding of the lower court in the opinion reported in 181 F. 632. See *Portland Railway, Light & Power Company, et al., Appellants*, vs. *City of Portland, et al.*, 218 U. S. 686, 31 S. Ct. 220 (Appeal from the Circuit Court of the United States for the District of Oregon. Dismissed with costs, on Motion of Counsel for the appellants).

Furthermore, the petitioners' proposition runs squarely into the prohibitions pronounced in *Owensboro Waterworks Co.* v. *Owensboro*, 200 U. S. 38, 26 S. Ct. 249, a suit to enjoin the diversion by a municipality of funds collected for a specific public object but not applied thereto on the theory that such failure of duty on the part of the municipality might ultimately cause the complainants to pay additional taxes, thus depriving them as taxpayers of their property without the due process of law guaranteed by the United States Constitution. The Court there said:

> ". . . as between citizens of the same state, the Federal court may not interfere to compel municipal corporations or other like state instrumentalities to keep within the limits of the power conferred upon them by the state, unless such interference is necessary for the protection of a Federal right. There has been no actual invasion here of any right secured by the Constitution of the United States; nothing more, taking the allegations of the bill to be true, than a failure of a municipal corporation to properly discharge the duties which, under the laws of the state, it owes to its people and taxpayers. And there is here no deprivation of property without due process of law within the mean-

ing of the 14th Amendment, even if it be apprehended that the defendant city may, at some future time, impose a tax in violation of its duty under the laws of the state.

"The utmost that can be said of the present case, as disclosed by the bill, is that the municipal authorities of Owensboro have done some things outside or in excess of any power the city possessed. But this does not of itself show that they acted without the due process of law enjoined by the 14th Amendment; for, if what is complained of had been done directly by the state or by its express authority, or if the legislature could legally ratify that which the city has done, as it undoubtedly might do, no one would contend that there had been a violation of the due process clause of the amendment. It cannot be that the acts of a municipal corporation are wanting in the due process of law ordained by the 14th Amendment, if such acts, when done or ratified by the state, would not be inconsistent with that amendment. Many acts done by an agency of a state may be illegal in their character when tested by the laws of the state, and may, on that ground, be assailed, and yet they cannot, for that reason alone, be impeached as being inconsistent with the due process of law enjoined upon the states. The 14th Amendment was not intended to bring within Federal control everything done by the state or by its instrumentalities that is simply illegal under the state laws, but only such acts by the states or their instrumentalities as are violative of rights secured by the Constitution of the United States. A different view would give to the 14th Amendment a far wider scope than was contemplated at the time of its adoption, or than would be consonant with the authority of the several states to regulate and administer the rights of their peoples, in

conformity with their own laws, subject always, but only, to the supreme law of the land.

"We are of opinion that this suit is not one arising under the Constitution of the United States, and, therefore, the parties being all citizens of Kentucky, it is not one of which the circuit court could take original cognizance."

The contention of the petitioners is further unsubstantiated for the reason that the facts alleged in this action do not fit the rule proposed. They say they do not attack the mechanics or procedure employed by the defendants, but contend that the authority under which the defendants purport to act is unconstitutional and as such deprive them of their property without due process of low guaranteed to them by the Fourteenth Amendment of the United States Constitution. (Petition, p. 6).

The question, we reassert, presents itself: Under what authority are the defendants acting? The defendants are proceeding in the condemnation proceeding under General Statutes of North Carolina, Section 115-125 (formerly 85), and other applicable statutes, but not under Chapter 1162 of the 1953 Session Laws of North Carolina, the statute which the petitioners claim as unconstitutional. The petitioners do not say that General Statutes of North Carolina, Section 115-125, the authority under which the defendants are condemning their lands in the proceeding in the State Court, is invalid as depriving them of their rights under due process of law under the Federal Constitution. In fact, they allege in Paragraph 21 of the complaint (Petition, Appendix, P. 6) facts showing that the authority and power under which the defendants are proceeding to condemn their lands meet every essential and particular requirement of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States.

This is not a matter for the federal courts.

Conclusion

The petitioners' alleged claim under the Constitution clearly appears to be immaterial and is obviously made solely for the purpose of obtaining jurisdiction. Likewise, their claim is wholly unsubstantial and frivolous. In such cases, the Court may, and should, dismiss the action for want of jurisdiction. *Bell* v. *Hood*, 327 U. S. 678, 66 S. Ct. 773, 90 L. ed. 939.

Even if it could be truthfully said this is a case within the jurisdiction of the Federal Court, it certainly is one in which the Court, in its discretion, could withhold the exercise of its jurisdiction, there being no want of another suitable forum. *Commonwealth of Massachusetts* v. *Missouri*, 308 U. S. 1, 19, 60 S. Ct. 39, 43; *Canada Malting Co.* v. *Patterson Co.*, 285 U. S. 413, 422, 52 S. Ct. 413, 415; *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 130, 53 S. Ct. 295, 297. This is one of the reasons why the District Court did not hear the matter on its merits and relegated the petitioners to an appropriate forum. *Laugnes* v. *Green*, 282 U.S. 531, 51 S. Ct. 243.

The reasons assigned by and relied on by the petitioners neither warrant nor impel the granting of the writ here sought. In fact, no rights of petitioners guaranteed by the Constitution of the United States have been violated. Hence, this petition for writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel.

APPENDIX A

1955—SESSION LAWS OF NORTH CAROLINA

Chapter 1372

An Act Rewriting, Rearranging, Renumbering and Amending Chapter 115 of the General Statutes, and Repealing Certain Obsolete Sections Thereof

The General Assembly of North Carolina do enact:

Section 1. That all the provisions of Chapter 115 of the General Statutes of North Carolina as contained in Volume 3A and the 1953 Supplement thereto, are hereby rewritten to read as follows:

"CHAPTER 115

EDUCATION

SUBCHAPTER I. GENERAL PROVISIONS

ARTICLE 1

State Plan for Public Education

Section 1. A general and uniform system of schools. A general and uniform system of public schools shall be provided throughout the State, in accordance with the provisions of Article IX of the Constitution of North Carolina, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years, and to every person twenty-one years of age, or over, who has not completed a standard high school course of study, or who desires to study the vocational subjects taught in such school. The minimum six months school term required by Article IX of the Constitution is hereby extended to embrace a total of one hundred and eighty days of school in order that there shall be operated in every county and city

administrative unit a uniform school term of nine months without the levy of a State ad valorem tax therefor, and in order that substantial equality of educational opportunity may be available to all children of the State.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, ROCKINGHAM DIVISION, SEPTEMBER TERM 1955

No. 337-S

ELIZA JANE DOBY and J. LILLIAN DOBY, Plaintiffs,

vs.

R. L. BROWN, JR., ET AL., Defendants

APPEARANCES:

For Plaintiffs: Messrs. O. W. Clayton, J. C. Sedberry, R. G. Sanders.

For Defendants: Messrs. Staton P. Williams and Hobart Morton.

The Court: Is it agreed between us for this hearing on the permanent injunction to hear the case on the merits and dispose of it? Is that satisfactory to the plaintiffs?

Mr. Clayton: Yes, sir, we have only the question of the affidavits involved in the question of hearing on the merits. We have certain affidavits.

The Court: Have you been able to stipulate some of the facts as suggested by the Court?

Mr. Clayton: Yes, sir. We have.

The Court: It is agreeable with you gentlemen to hear it at one time?

Mr. Williams: Yes, sir.

The Court: It will not be necessary to read the Complaint and Answer. We will state what you have been able to stipulate to.

Mr. Clayton: Your Honor, in connection with that in order to point up the stipulations we have listed the paragraphs in the Complaint that are admitted and have taken certain of the other allegations in the Answer and have stipulated to them and I would like, if your Honor please, to read if you do not want the paragraphs of the Complaint, I would like to call the Court's attention to those numbered paragraphs. Numbers, one, two, three, four, five, eight, nine, ten, eleven, twelve, thirteen and twenty-three, those appear as admissions, Your Honor, in the Complaint and Answer and for the purpose of the record we have them also as stipulations.

The next stipulation is that the date of the call of the election of the Bond Issue was April 20, 1954.

The next stipulation—It is stipulated that it is the purpose of the defendants to pay the value at which the lands are determined in the condemnation proceedings from money derived from the sale of the bonds, said bonds.

Further, it is stipulated that at the time of the institution of this action there was and at this time there is pending in the Superior Court of Stanly County a condemnation proceedings instituted by the Trustees of the Albemarle City Administrative Unit and the Superintendent of Public Instruction against Eliza Jane Doby and J. Lillian Doby for the purpose of condemning the same lands referred to in this federal court action.

Further it is stipulated that it is the purpose of the defendants to condemn the lands of the plaintiff for the purpose of erecting on said lands a high school plant for the use of such pupils of the Albemarle Administrative Unit as are eligible or may from time to time become eligible for admission thereto under the laws of the land.

We think, Your Honor, that those latter admissions, stipulations, while they are somewhat in the language of the Answer are matters that need not be at issue by reason of not having responsive pleadings of the plaintiff.

The Court: Is there anyhing in the pleadings or in the stipulations as to when the condemnation suit was instituted against the plaintiffs in this case?

Mr. Clayton: No, sir.

The Court: I was reading something in this connection when I came back from lunch and the question arose in the Supreme Court as to whether valid services had been obtained upon the owners of the property and they appealed to the Supreme Court of North Carolina and the Supreme Court held that they had been properly served and were before the court.

Mr. Clayton: That's right, sir.

The Court: Have you stipulated anything that will cover that?

Mr. Clayton: I don't believe so. Mr. Williams, do your pleadings cover that?

Mr. Williams: They do not.

The Court: Don't you know when the condemnation suit was started? Let's get it in the record.

Mr. Clayton: I will look and see if I can find the exact date, Your Honor.

The Court: While he is looking at that can any of you tell me where the Supreme Court decision is?

Mr. Sedberry: This condemnation proceedings was instituted on November 20, 1954.

The Court: And an appeal was taken on the question of service?

Mr. Sedberry: That's right.

The Court: And the Supreme Court decision in that case, the case of Brown and others against Doby and others was reported 242 NC Report at page 462. Put that in the record.

Now let's get back to the stipulations.

Mr. Sedberry: I suppose that is sufficient to show when the case was instituted.

The Court: And that same case is still pending in the Stanly County court and was when this suit was started?

Mr. Clayton: That's right and was when our action was started and was the action referred to in our stipulation.

The Court: All right.

Mr. Clayton: Well, that, Your Honor, is as far as we have been able to go by way of stipulations. If there are any other matters that Your Honor can call to our attention that you think material for stipulation you might mention them and we may be able to arrive at a stipulation. We didn't think it was necessary on the date of the condemnation, and that is the reason we hadn't included that date.

(367-3)